IN THE

Supreme Court OF THE United States.

STATEMENT OF CASES, ASSIGNMENTS OF ERROR, AND BRIEF.

The DELAWARE R. R. CONSTRUCTION CO. & DELAWARE COUNTY R. R. CO., *Appellants,*

vs.

LEWIS H. MEYER AND WILLIAM DENNISON, TRUSTEES, *Appellees.*

209.

Appeal from the United States Circuit Court for the District of Iowa.

The DELAWARE R. R. CONSTRUCTION CO., *Appellant,*

vs.

LEWIS H. MEYER AND WILLIAM DENNISON, TRUSTEES, *Appellees.*

210.

Appeal from the United States Circuit Court for the District of Iowa.

LEWIS H. MEYER AND WILLIAM DENNISON, TRUSTEES, *Plaintiffs in Error,*

vs.

The DELAWARE R. R. CONSTRUCTION CO.

500.

In Error to the Supreme Court of Iowa.

P. C. KENYON, Legal Printer, Des Moines, Iowa.

STATEMENT OF CASES, ASSIGNMENTS OF ERROR, AND BRIEF.

STATEMENT OF CASES.

These cases are substantially between the same parties, grow out of the same transaction, and will therefore be stated together.

The facts, in their chronological order, are as follows:

(Our references, except when otherwise noted, will be to folios in 209.)

August 6, 1870:

Contract made between the Delaware Railroad Construction Company and Davenport & St. Paul Railroad Company, by which the former agreed to grade and construct all of the line of the latter company's road in Delaware county, according to the specifications, for which it was to be paid the prices therein named, eighty per cent. thereof to be paid on estimates, and the remaining twenty per cent. within thirty days after the completion of the work and its acceptance by the engineer. The payments were to be made every thirty days, at the office of the president of the St. Paul company, in Davenport. When five consecutive miles of the work was completed and accepted, the full contract price was to be paid within thirty days thereafter, without deducting the twenty per cent.; and so on, for every additional five miles so completed and accepted. (Folios 445, 453.)

September, 1870:

The work was commenced under this contract, and completed in the same month of 1872. (Folio 393.)

December 20, 1872:

The Construction Company filed in the office of the clerk of the district court of Delaware county a statement for a me-

chanic's lien, showing that the work done and materials furnished amounted to $190,862.63, that they had been paid thereon $119,697.05, and that there remained due $71,165.58. (Folios 495, 501.)

July 1, 1871:

A mortgage was made by the Davenport and St. Paul Company to Thompson and Dennison, trustees, and recorded February 7, 1872, covering the property of the railroad company then owned or to be acquired, which, however, was released of record August 24, 1872. Two supplimental mortgages between the same parties were made the same date, and recorded March 25 and 28, 1872, and both released the date aforesaid (August 24, 1872.)

June 4, 1872:

Another mortgage was made which appears to be dated July 1, 1871, acknowledged May 16, 1872, and recorded June 4, 1872. It is upon this mortgage alone, that the trustees claim any right. Its validity is denied by us. The effect of it upon our mechanic's lien will be considered in the further argument of the case. (Folios 398, 399, 420, 593, 594.)

January 10, 1874:

The said Delaware Railroad Construction Company commenced its suit in the Delaware county Circuit Court to enforce its lien under the contract of August 6, 1870, as a mechanic, upon so much of the railroad as was situated in Delaware county, showing that the whole length of line in said county, contemplated by said contract had been completed, and making the Davenport & St. Paul Company, Thompson and Dennison, trustees; the Davenport Railway Construction Company, and one Howard, defendants.

(The case was afterwards dismissed as to said Howard.) The balance claimed to be due in said action was $55.000. (Folios 394, 475, 494.)

February 6, 1874:

A decree was entered in the said Delaware Circuit Court against the Davenport and St. Paul Company, and in favor of the said Delaware Railroad Construction Company, for the sum of $50,930.54; the lien established with right to execution, and the cause continued as to all other parties. (Folio 245, 250.)

February 17, 1874:

Execution was issued upon this judgment, and on the 4th of the next May the property covered by the lien and decree aforesaid, was sold to R. Eddy, as trustee for the plaintiff in that action, for the sum of $53,100.00. (Folios 394, 541, 557.) The sheriff gave to Eddy a certificate of sale in due form. (Folios 422, 426.) He also executed to him a deed of same date (May 4, 1874), for the whole property, being the line of said road in Delaware county, the same having been appraised and sold without right of redemption. (Folio 430, 436.)

April 7, 1874:

The said Delaware Railroad Construction Company filed its supplemental petition in the Delaware Circuit Court, setting up the former decree, and asking that the other defendants, including said trustees, be foreclosed their equity of redemption, and that the lien of said Construction Company be declared paramount, &c. (Folio 540.)

April 9, 1874:

Publication was made of the filing of said petition, and due proof thereof filed with the clerk May 5, 1874 (the date 1875 is evidently a mistake, folios 544, 546; it is correct in No. 210; see folios 132 to 136). The sheriff had made return upon the original notice that the said defendants were not found in his county, and an affidavit of the non-residence of Thompson, and Dennison was duly filed. (Folios 539, 552.)

May 22, 1874:

A decree was entered by said Delaware county Circuit Court finding that the allegations of the original and supplemental

petitions were true, foreclosing the equity of redemption of said defendants (Thompson and Dennison), and declaring the rights of plaintiff to the property to be paramount, &c. (Folios 533, 534.)

January 19, 1875:

Eddy, who purchased at the sheriff's sale, and who obtained the certificate and deed aforesaid, conveyed all the property bought by him, to the Delaware County Railroad Company for the consideration of $53,974.73, and on the next day (January 20, 1875), assigned to the said company the said sheriff's certificate of sale. (Folios 426, 429.)

January 26, 1875:

Dennison representing that he was the surviving trustee, etc., moved for a new trial in said cause and filed his answer (folios 555, 557), and on the same day a new trial was ordered and the cause continued. (Folio 558.)

February 2, 1875:

The plaintiff in that action moved to strike this answer. (Folio 559.)

May 17, 1875:

This motion was sustained, and a default asked as to said Dennison. (Folio 539.)

May 19, 1875:

Leave was given to file an amended answer, and it was accordingly filed. (Folios 560, 562.) On the same day Meyer asked to be substituted as a co-defendant, upon the ground that he had been appointed a trustee under the mortgage, in the place of Thompson who had deceased. (Folio 563.) A prayer was also filed on that date asking to transfer said cause to the Circuit Court of the United States for the district of Iowa (folio 564, 565), following which, is a bond for such removal, dated March 20, 1875. (Folio 565.)

May 20, 1875:

Dennison filed his motion for a continuance (folios 567, 569). On the same date the amended answer was struck from the files and the motion to continue overruled (folio 570). Thereupon another amended answer was filed by Dennison on the same day (folio 571), which was again amended May 21, 1875 (folio 575), and a reply thereto filed of same date. (Folio 577.)

May 22, 1875:

The cause was called for trial, application of Meyer to be made a party was overruled, and the trial proceeded. Plaintiff introduced in evidence the contract described in the petition and under which the work was done. And thereupon defendant asked leave to file an amended bond and petition for removal which was objected to for reasons stated and the objection sustained. Defendant then moved that the court proceed no further, and this motion was overruled.

Dennison filed an amendment to his former answer and the trial proceeded upon the issues joined, both parties appearing by counsel, and after it was heard the cause was taken under advisement, and afterwards a decree entered fully confirming plaintiff's lien and the former decree of the court (that of the May term, 1874), and that such lien was paramount to that of defendant. (Folio 581.)

June 30, 1875:

Dennison perfected his appeal from this decree (that of May 22, 1875) to the Supreme Court of the State. (Folio 583.)

August 24, 1875:

He filed his petition asking a correction of the said decree, and an order was made by the judge staying any proceeding under the same until the said application could be heard. (Folios 585, 588.)

October 9, 1875 :

Meyer and Dennison filed in the office of the clerk of the Circuit Court of the United States for Iowa a transcript of record of said cause. (Case 210, folio 3.)

October 12, 1875 :

The defendants, the trustees, entered their appearance. (No. 210, folio 370.)

October 13, 1875 :

The plaintiff, the Delaware Railroad Construction Company, moved to dismiss for want of jurisdiction. (No. 210, folios 372, 374.)

October 14, 1875 :

The decree as amended, upon the motion of Dennison, August 24, 1875, was duly entered in the Delaware Circuit Court, not differing however in any essential respect from that of May 22, 1875. (This decree will be found set out at length in case 300, folio 189, *et seq.*, and case 210, 379, *et seq.*

October 19, 1875 :

The motion to dismiss, filed by plaintiff on the 13th inst. in the circuit court, was denied.

May 4, 1875 :

While all these matters were taking place, Meyer, as intervenor, filed his petition in equity in the United States Circuit Court for Iowa, in the case then pending in the name of one Loomis, in which he made Dennison, the Davenport & St. Paul Company, the Delaware Railroad Construction Company, the Delaware Railroad Company, and many other parties, defendants ; setting up the mortgages made by the Davenport & St. Paul Railroad Company, and various other matters which he claimed entitled him to equitable relief, asking foreclosure of said mortgages, and that the liens thereof be declared paramount to all others. (This is case 209. See folios 6 to 35.) Issues were joined on this petition, cross-bills were filed, the case heard, and, on the 8th of June, 1876, a decree was entered

establishing the priority of the lien of the trustees under the mortgages, and declaring the judgments of the Delaware Circuit Court null and void as prior liens, and ordering that deeds made by the sheriff be canceled, &c. (Folio 457.) From this decree the Delaware Railroad Construction Company and the Delaware Railroad Company appealed to this court. (Folios 459, 468; being case 209.)

June 8, 1876:

A like decree was entered in the case transferred from the Delaware Circuit Court, and filed as aforesaid October 9, 1875, and the said Delaware Railroad Construction Company appealed to this court. (This is case 210. See folios 414, *et seq.*)

April 24, 1876:

The cause appealed to the Supreme Court of the state was submitted, and on the 26th of the following June, said court affirmed the judgment of the court below, filing its opinion. The cause was again, October 5, 1876, submitted on petiton for re-hearing, granted, and on the 7th of June 1877 the judgment was again affirmed. (This is case 500, folio 212, *et seq.*)

June 12, 1877:

Meyer and Dennison prayed for a writ of error from this judgment. A bond was filed, writ of error issued, and severaly reciting that Meyer and Dennison were parties to that appeal, etc. (Case 500, folio 235, *et seq.*)

GEO. G. WRIGHT AND
JNO. M. BRAYTON,
for Appellants.

And now having submitted this statement, counsel for appellants in cases 209, 210, make the following

ASSIGNMENT OF ERRORS.

THE DELAWARE RAILROAD CONSTRUCTION CO. AND THE DELAWARE COUNTY R. R. CO., *Appellants*, vs. LEWIS H. MEYER AND WILLIAM DENNISON. } 209.

Appeal from the Circuit Court of the United States for the District of Iowa.

1. The appellants ask a reversal of this case because, upon the evidence, the decree was not authorized, and the equities should have been found for them and not for appellees. (See brief.)

2. The court below erred in not awarding the property to the Delaware Railroad Company, and in not finding that it was entitled to damages for the detention of the same.

3. There was error in setting aside the judgment of the Delaware Circuit Court, since the allegations and proofs established a valid contract by appellant (the Construction Co.), fully performed, and its right to a lien was paramount to any mortgage under which appellees claim.

4. There was also error in setting aside the sale under the judgment of the State Circuit Court, without evidence that any bonds had been issued under the mortgage wheron appellees claim to be trustees.

5. It was error to set aside the judgment and sale when the Davenport & St. Paul R. R. Co. was not before the court, and especially without proof that Meyer had ever been appointed a trustee, and when there was no prayer warranting the relief granted.

GEO. G. WRIGHT, AND
JNO. M. BRAYTON,
for Appellants.

THE DELAWARE RAILROAD CONSTRUCTION CO. *Appellants,*
v's.
LEWIS H. MEYER AND WILLIAM DENNISON. } 210.

APPELLANTS ASK A REVERSAL—

First. Because, under the constitution and laws of the United States, the court below had no jurisdiction to hear or determine the case, and their motion to dismiss and remand should have been sustained.

Second. If this is not so, and if the court below had jurisdiction, the evidence did not authorize the decree, nor any part of the final order made herein.

Third. The application to transfer was not made in time; was not signed or subscribed by any party to the record, or any attorney; was by persons not known to the record; was not made for the transfer of the suit, but a part of it; was waived by pleading, asking a continuance, going to trial, trying the case, taking an appeal from the order of the State Circuit Court, and should have been joined therein, for the proper and full determination of the controversy, the other defendants. And there was no sufficient or proper bond, with requisite sureties filed.

Fourth. Appellant claimed under a valid contract; there was nothing in the evidence to defeat its right; nothing to warrant the order setting aside the judgment of the Delaware Circuit Court; nothing to show that the bonds had ever been issued under the mortgage. Nor that the rights of appellees were not subordinate to those of appellant.

Fifth. It was error to treat Meyer as a party to the record, or to permit him, jointly with Dennison, to file and transfer the case.

GEO. G. WRIGHT, AND
JNO. M. BRAYTON,
for Appellants.

LEWIS H. MEYER & WILLIAM DENNISON,
Plaintiffs in Error,

vs.

THE DELAWARE R. R. CONSTRUCTION CO.

500.

IN ERROR TO THE SUPREME COURT OF IOWA.

Appellee claims that the judgment below was right, and that plaintiffs in error made no such showing as entitled them to a removal of the case to the Federal Court. (See Brief.)

GEORGE G. WRIGHT AND
JNO. M. BRAYTON,
for Appellee.

BRIEF.

And having thus submitted our statement and assignments of error, we present, for the consideration of the court, the following brief of our points, the same referring to and covering all the cases, and so submitted by agreement with opposite counsel, to save unnecessarily encumbering the record.

I.

With this explanation, we inquire, *first*, were appellees (these trustees) entitled to remove the case from the State to the Federal Court? We say not, and hence that the Supreme Court ruled correctly in No. 500, and that the Federal Court should have sustained our motion to dismiss and remand. (Case 210.)

Because there was not filed in the Circuit Court of Delaware county, Iowa, a *petition* for removal as required by law.

1. The paper claiming to be a petition was never *signed* by any one nor sworn to, nor was it in any sense or form a petition under the statute. (Folio 169.)

Barber's Ch. Pr., 578.
Daniel's Ch. Pr., 1608.

The Iowa Statute (Code 2669) provides "that every pleading must be subscribed by the party or his attorney."

And see also—

R. S. U. S., Sec. 914.

2. After the so-called petition was filed, Dennison invoked the jurisdiction of said State Circuit Court by asking a continuance of the case, and hence could not afterwards insist upon the removal based upon the so-called petition. (Folio 175.)

West vs. Aurora City, 6 Wall., 139.

Home Ins. Co. vs. Curtis, Mich. Sup. Court, 3 Cent. L. J., 27.

11 Pet., 80; 4 Wall., 599; 12 Pet., 59; 1 Brock., 380; 20 How., 581; Crabbe, 179; 1 Dev. C. C., 25.

3. He also filed answers, after handing to the clerk his so-called petition, and thus waived the same (No. 210, folios 181, 189.) (Authorities under last point.)

4. This so-called petition was not brought to the attention of, nor was it known to the court until *after the trial had commenced*, and was too late (folios 198, 201, 381.) (Act 1875, Ch. 137, 553.)

5. The application was in the name of Meyer and Dennison when Meyer was not a party, and hence was properly refused.

6. There was but one cause for removal stated in the so-called petition, to-wit: "local influence," and as this was not sworn to, as the law requires, the U. S. Circuit Court of Iowa erred in overruling our motion to dismiss. (Acts of 1867 and 1875, Revised Statutes, Sec. 639.)

7. Dennison could not, on his own motion, remove this case, nor could Meyer and Dennison without removing it as to the Davenport and Saint Paul Railroad Co., as well as the Delaware Railroad Construction Co., for without the presence of the first-named company the cause could not be fully and finally determined. (Act 1875, Sec. 2.)

8. Dennison, as a trustee, was a claimed mortgagee and sought to remove the cause in a controversy between himself and the Construction Company (another mortgagee) without removing it as to the mortgagor, which we say could not be done. The Davenport and St. Paul Company was an indispensable party. The controversy between the mortgagees was only incidental to the main action or suit.

Bank vs. Turnbull, 16 Wallace, 190.
Wayne vs. Southard, 10 Wheaton, 1.
Burch vs. The D. & St. P. Co., 46 Iowa, 449.
Gardner vs. Brown, 21 Wallace, 41.
Sewing Machine Cases, 18 Wallace, 553, 587.
Chapman vs. Barger, 4 Dillon, 557.

9. No evidence was furnished that petitioner was not a citizen of the State of Iowa, and that this is necessary, see—

Railway Co. vs. Ramsey, 22 Wallace, 328.
Delaware Co. vs. Davenport & St. P. Co., 46 Ia., 448.
Holden vs. Putnam Ins. Co., 46 N. Y., 1.

10. The record shows that Dennison appealed to the Supreme Court of Iowa from the order refusing to transfer, and that this appeal was pending at the time he filed his transcript in the Circuit Court of the United States. By so appealing he was estopped from pursuing his remedy by transfer, and for this reason the same should have been dismissed by the said Circuit Court. The appeal was taken June 30, 1875, and was pending, as the record shows, when this transcript was filed October 9, 1875. (No. 210, folios 204, 205, and 1, 2 and 3.)

11. The case was transferred by Meyer and Dennison when Meyer was not a party to the record, and the court below erred in recognizing or treating him as such. (Folio 200.)

12. The so-called petition was not applicable to the case, in that it ommitted the Davenport & St. Paul Company, an indispensable party, and included Meyer and certain intervenors who were not parties to the record.

13. If it shall be held that the petition states two causes for removal (the "difference in citizenship and local influence"), then as it should have been sworn to as to one ground (local influence), we insist that it was not good as to either, for that, the U. S. Circuit Court of Iowa was not to determine as a court for the correction of errors, whether the Circuit Court of Delaware county had ruled erroneously, but whether under the law, the applicant had so complied with the requirements of the statute as to oust the jurisdiction of the State Court. In such cases the jurisdiction of the State Court having once attached (and this cannot be denied in this instance), it could not be divested unless the petition is filed with averments such as the law requires, positive and express in their character, and it is not sufficient that the jurisdiction shall be inferred or denied argumentatively from such averments.

Brown vs. Keene, 8 Peters, 112.
Gibson vs. Johnson, Pet. C. C., 44.
Redmond vs. Russell, 12 John., 153.
Ward vs. Arredenlo, 1 Paine, 410.

14. It is the *suit*, not a *branch* of it, which is to be removed under the law. In this case it was a branch, and not the suit, which was brought to the U. S. Circuit Court, and therefore it should have been remanded.

Arrapahoe Co. vs. K. P. Co., 4 Dill., 277.

15. After final judgment against the defendant, the debtor and owner of the property, the suit was not removable to the Federal Court upon the application of any one lien holder in the controversy between himself and a party obtaining such final judgment.

Van Never vs. Bryant, 21 Wallace, 43.
Stevenson vs. Williams, 19 Wallace, 575.

16. By afterwards submitting to the jurisdiction of said court; by stipulating as to the time of rendering the decree therein; by also invoking that jurisdiction in asking a correction of the order or decree, and by appealing to said Supreme

Court, the petitioner waived his application, submitted to such jurisdiction, and had no right to transfer the case. (Authorities above cited.)

17. The law required, and the obligation of the trustees by the terms of their bond was to file the transcript in the circuit court, on the first day of the next term thereafter. This was not done, for the court convened on the 8th, and the transcript was not filed until the 9th of October, 1875. For this reason, also, the cause should have been dismissed. (Case 210. Folios 1, 3.)

18. The bond was not such as the law requires, in that it was signed by an attorney, and the court therefore properly rejected it. The law of Iowa is and was as follows (Code, Sec. 2931): "No attorney or other officer of court shall be received as security in any proceeding in court."

19. The application to remove should have been made and filed at prior term of the Delaware Circuit Court, being the first term at which the case could have been tried.

The Iowa statutes bearing upon this subject are as follows

Sections 2744, 2745, of the Code:

"2744. Except where otherwise provided, causes shall be tried at the first term after legal and timely service has been made.

"2745. The appearance term shall not be the trial term for equitable actions, except those brought for divorce, to foreclose mortgages and other instruments in writing whereby a lien or charge on property is created, *or to enforce mechanic's liens.*"

Also—

"2741. All issues of fact, whether ordinary or equitable, shall be tried upon oral evidence taken in open court. * * * And the Supreme Court upon appeal shall try only the legal errors duly presented.

"2742. But in equitable actions, other than actions to foreclose mortgages, * * * to *enforce mechanic's liens*, or for divorce or nullity of marriages,

if any party shall, at any time during the appearance term, move the court for a trial upon the written evidence, the court shall either order all the evidence to be taken in the form of depositions, or shall cause all the evidence offered on the trial to be taken down in writing, to be certified by the judge and made a part of the record, according to the requirements of the motion. In either of such cases, all the evidence so taken shall go on appeal to the Supreme Court, which shall try the case anew."

20. In No. 500 (being error to Supreme Court of the state), it is further insisted that plaintiffs appealed to said court from the judgment of May 22, 1875; that at their instance "a corrected, amended and reformed" decree was entered October 14, 1875, from which they did not appeal; that the decree appealed from was thus *vacated* on their motion; that there was hence nothing before the Appellate Court of the state, and therefore nothing in this.

21. Also in same case it is insisted that Dennison alone appealed to the State Supreme Court, and Meyer is not known to the record, and yet both prayed this writ of error in this case. (Folio 110, 235). The bond recites that both are appellants, and the citation also that the D. & St. P. Co., and Meyer & Dennison are appellees in this jumble and confusion. This court cannot tell who are the plaintiffs in error, and least of all, how Meyer gets into this court, or into the court below.

Kail vs. Wetmore, 6 Wall., 451.
Clark vs. Hancock, 94 U. S., 493.

II.

The points above made, as already suggested, apply to numbers 210 and 500. The following apply to 209 and 210, for they both stand substantially upon the same record, and aside from the jurisdictional question, are alike. Upon the merits we claim:

1. That the decree in each case should have been for the appellants.

2. The lien of the appellant, the Delaware Railroad Con-

struction Co., was paramount and superior to that of the appellees, and the court should have so held.

3. There was no evidence that any money was paid by any one under the mortgage given to secure the bonds named or referred to therein, or that any bonds were issued, and hence, nothing to show that appellees had any right to the relief prayed and granted.

4. The appellant, the Delaware Railroad Company bought the property and obtained a title before any application was made for a new trial by Dennison or anyone. (The new trial was asked January 26, 1875, No. 210, folio 152.) The property was sold by the sheriff to Eddy, May 4, 1874, and to the Delaware Railroad Company, January 19, 1875 (folios 143, 474, 506.) Under such circumstances the court had no power to set aside the decree entered in the said Delaware Circuit Court and a sale made thereunder. The title of said Delaware Railroad Company was complete and perfect, and even if the decree itself was subsequently set aside this could not affect or invalidate the sale made by the sheriff, nor the conveyance by the sheriff's grantee, and especially so since all took place *before* the jurisdiction of the circuit court of Delaware county was questioned by anyone.

Union Natl. Bank vs. Ames, 37 Iowa, 672.

Code of 1873 (which in this respect is the same as the Rev. of 1860), §§ 2877 and 2878, as follows:

"SEC. 2877. When a judgment has been rendered against a defendant or defendants served by publication only and who do not appear, such defendants, or any one or more of them, or any person legally representing him or them, may, at any time within two years after the rendition of the judgment, appear in court and move to have the action re-tried, and, security for the costs being given, they shall be admitted to make defense; and thereupon the action shall be retried as to such defendants as if there had been no judgment; and upon the new trial, the court may confirm the former judgment or may modify or set it aside, and may order the plaintiff to restore any money of such defendant paid to him under it and yet remaining in his possession, and pay to the defendant the value of any such property which may have been taken in attachment in the action or under the judgment and not restored.

"SEC. 2878. The title of a purchaser in good faith to any property sold

under attachment or judgment, shall not be affected by the new trial permitted by the preceding section, except the title of property obtained by the plaintiff and not bought of him in good faith by others."

Lessee of Taylor vs. Boyd, 3 Ohio, 337.
Heirs of Ludlow vs. Kidd, 3 Ohio, 541.
Wilkinson vs. Curtis, 11 Ind., 514.

5. No indebtedness of the Davenport & St. Paul Company to appellee was shown under the mortgage of June 4, 1872, and all other mortgages were released.

6. The contract with appellant (Delaware County Construction Company) for the work done, and for which the mechanic's lien was prayed and granted, was made August 6, 1870; the work commenced and the *lien dated* from September in the same year. The only mortgage of appellees not released was recorded June 4, 1872. From that time, and from that only, did we have notice of their lien, if any they had. Our lien was, therefore, paramount as to the work done and all materials furnished, whether *before* or *after* the recording of such mortgage, and the court below should have so found. And this is equally true if the mortgage should date from July 1, 1871.

Monroe vs. West, 12 Iowa, 119.
Neilson vs. Eastern R. Co., 44 *Ib.*, 71, and cases cited.
Davis vs. Bisland, 18 Wall., 659.
French vs. B., C. R. & M. Co. 44 Dillon, 570.
Jones vs. Swan, 21 Iowa, 181.
Lamb vs. Hanneman, 40 Iowa, 41.

7. The validity of all the mortgages and bonds set up by appellees was denied by us, and as none were offered in evidence, the appellees were not entitled to any relief, there being no evidence whatever upon which to base it.

8. We made our contract and performed our work before notice of their lien, and as we complied with the law in filing in the proper clerk's office a statement of our claim, we were,

under the statutes of Iowa, entitled to priority over said claimed mortgage liens.

Revision of Iowa, 1860, sections 1845, 1846, 1851, and 1866, as follows:

"SEC. 1845. No person is entitled to a mechanic's lien who takes collateral security on the same contract.

"SEC. 1846. *Be it enacted by the General Assembly of the State of Iowa*, That every mechanic, builder, artisan, workman, laborer or other person, who shall do or perform any work or labor upon, or furnish any materials, machinery or fixtures for any building, erection or other improvement upon land, including contractors, sub-contractors, material furnishers, mechanics and laborers engaged in the construction of any railroad or other work of internal improvement, or for repairing the same under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor or sub-contractor, upon complying with the provisions of this act, shall have for his work or labor done, or materials, machinery or fixtures furnished, a lien upon such building, erection, or improvement, and upon the land belonging to such owner or proprietor on which the same is situated, to secure the payment of such work or labor done, or materials, machinery or fixtures furnished.

"SEC. 1851. It shall be the duty of every person, except as has been provided for sub-contractors, who wishes to avail himself of the provisions of this chapter, to file with the clerk of the district court of the county in which the building, erection, or other improvement to be charged with the lien is situated, and within ninety days after all the things aforesaid shall have been furnished, or the work or labor done or performed, a just and true account of the demand due or owing to him after allowing all credits, and containing a correct description of the property to be charged with said lien and verified by affidavit.

"SEC. 1866. Every person, including all *cestuis que trust*, for whose immediate use, enjoyment, or benefit, any building, erection or improvement shall be made, shall be included by the words "owner or proprietor" thereof, under this act, not excepting such as may be minors over the age of eighteen years or married women."

Also, Chapter 111, Laws of 1862, as follows:

"SEC. 1. *Be it enacted by the General Assembly of the State of Iowa*, That the following words are hereby added to section eighteen hundred and fifty-one of Revision of 1860, to-wit: "But the failure to file the claim, account, settlement or demand, in the time named in this section and in section 1847, shall not operate to defeat the claim or demand, nor the lien of the person supplying the labor or material, as against the owner, nor the contractor, nor as against anyone except purchasers or incumbrancers, without notice, whose rights accrued after the ninety days and before the account, or settlement, or claim, or lien is filed. Approved April 7th, 1862."

9. There was nothing in the terms of the contract under which the work was done waiving the right to a lien, for no collateral security was taken, or if any, this part of the contract was changed and modified for a good and sufficient consideration before notice of any lien of appellees, and they cannot claim any advantage or benefit from said supposed collateral security. (Folios 393, 501, 502, 503, 747, 748, 749, 753, 755, *et seq*, to 760).

10. The provision in the contract as to payment "by the citizens of Delaware county," is not in the nature of, nor does it have the effect of providing "collateral security." It neither furnishes a guarantee of the performance of the contract by the Railroad Company, nor did it transfer property or anything to insure the performance of such original agreement, and was hence not collateral security.

Phillips on Mechanic's Liens, § 285.

Delaware Construction Company vs. Davenport & St. P. 46 Ia., 412.

Christmas vs. Russell, 14 Wallace, 69.

Mervin vs. Sherman, 9 Iowa, 331.

And this construction of the Iowa Mechanic's Lien Statute, the court will follow:

Kingston vs. Moore, 7 Pet. 542.

The Iowa statute is as follows (Section 1845, Rev. 1860): "No person is entitled to a Mechanic's lien who takes collateral security on the same contract."

11. The Delaware Railroad company was a good-faith purchaser from the Construction company, and neither the application of the trustees for a new trial, nor any action of any court holding the judgement under which the same was made by the sheriff, to be eroneous could affect the title of such purchaser. (Authorities above cited, under clause 4). There is no evidence tending to show that they were not such purchasers.

12. Under the laws of Iowa, section 3, chapter 102, 1870, as follows:

"The funds collected under the provisions of this act shall be paid out by the county treasurer to the treasurer of the railroad company, upon the orders of the president or managing director of the railroad company, whose road such tax has been voted to aid; which orders shall be accompanied by sworn estimates of the engineer in charge of the work on such road, showing that double the amount of such orders has been expended for the construction of such road, in accordance with the terms of the notice provided for in section two of this act, and also by a certificate signed by the members of the council or board of trustees, or a majority of the members thereof, of the township, city or town, voting the tax for which said orders are drawn, to the effect that the provisions of this act have been so complied with as to entitle said company to the amount called for by such orders, and it is hereby expressly provided that no part of the funds raised under the provisions of this act shall be *expended* in any other townships than those specified in the notice of election: *Provided, however*, that should the said taxes not be drawn from the county treasury in accordance with the provisions of this act by the railroad company in whose favor the same may have been voted, within two years after the date of the collection thereof, then the right of said railroad company to said funds shall be deemed forfeited, and the same shall be repaid by the county treasurer to the persons from whom the same may have been collected."

The Davenport & St. Paul company controlled the tax voted and which was referred to in the provision as to payment by the citizens of Delaware county. It was to be paid out by the county officers upon the order of the officers of said company. There was no transfer of this tax, nor of any claim or debt held by the railroad company upon the citizens of Delaware county. The obligation to pay by the terms of the contract of August 6, 1870, was absolute and unconditional upon the part of the railroad company, and to pay too, as the work progressed, and not contingent in any manner upon the receipt of money from taxes or otherwise.

See authorities above, and also—

Whittel vs. Skinner, 23 Vt., 531.
Palmer vs. Miller, 6 Cush., 282
1 Parsons on Contracts, 6th Ed., 228.

13. The Construction Company was not given any control of any debt or money owing by the citizens of Delaware county by any writing or contract, and that the parties understood that there had been no transfer or assignment of

such debt or money, is most manifest from the action of the Railroad Co., who placed their own interpretation upon the contract in using the money paid by said citizens in procuring the right of way, paying engineers, and incidental expenses. (Case 209, folios 603, 604, 725, 730.) And this was all before any mortgage had been executed.

III.

The following points apply to No. 209 exclusively:

1. There is a total absence of proof to support the allegation in complainant's bill that Meyer was, in December, 1874, appointed a trustee in place of Thompson. (For allegation see bill, folio 7.)

The answers of both appellants deny this (see answers, folios 192, 295 and 296). The bill is framed upon the theory that Meyer is the one trustee entitled to relief, and the failure of proof of this essential averment is fatal to his right to relief.

2. The relief prayed in the cross-bill should have been granted by U. S. Circuit Court for Iowa.

In September, 1875, the Delaware County R. R. Co. applied by petition for the road in Delaware county, and compensation for its use from May 5, 1875 (see petition and exhibits, folios 237 to 283). The receiver was ordered to show cause why this should not be done. (See order, folios 233, 234.)

The receiver, for cause, showed the claim of the trustees. (See answer of Henry, receiver, folios 286 to 293.)

The court declined to grant this relief by petition, but gave leave to set up the claim by cross-bill in this suit. (See record entry, folios 316 and 317.)

The company filed its cross-bill Dec. 6, 1875, fully setting up its title, the proceedings of the Delaware Circuit Court, and its claim for damages for use from May 5, 1875. (See cross-bill, folios 339 to 354.)

The complainants answered, claiming that the Delaware Construction Company took collateral security on its contract,

and that it and the Delaware County Railroad Company were substantially the same party. (See answer, folios 359 to 375.)

The evidence clearly established the title of the Delaware Co. R. R. Co. to the property, and its right to the use of it from May 5, 1875.

(For title see decrees against D. & St. Paul R. R. Co. and trustees, folios 537, 538, 553, 554; execution and sheriff's return, 546 to 550; certificate of sale, 422 to 425; assignment of it, folio 426; sheriff's deed 437 to 442; and stipulation, folio 392 to 399.

For proof of payment, see testimony of R. Eddy (folios 689, 690 and 696), and stipulation (folios 395, 396.)

The Delaware R. R. Co. also paid $2,979.60 to redeem from a prior mechanic's lien. (See stipulation, folio 404.)

That the two companies are different is clear from these admitted facts.

The Construction Company was composed of seven persons. Of these, six, with three not members of it, organized the Railroad Company, and another, not a member of the Construction Company, afterwards was admitted. (See stipulation, folios 401 to 405.)

In its cross-bill the Railroad Company claimed $12,000.00 for the use of the road in hands of receiver. (Folios 350, 551.)

The answer of complainants admit the receiver, Henry, held possession of the property from March, 1875. (See folio 360.)

The proof establishes its use to have been worth $2,000 per month. (See testimony of A. E. Martin, folios 737, 738, and of R. Boon, folio 720½.)

By this evidence (and none in opposition to it was offered), the use from May 5, 1875, when the year for redemption expired, to December 6, 1875, when the cross-bill was filed, would amount to the claim made therein.

GEO. G. WRIGHT AND J. M. BRAYTON,
Solicitors for Parties named.

GEO. G. WRIGHT, *of Counsel.*

IN THE

Supreme Court OF THE United States.

ARGUMENT.

The DELAWARE R. R. CONSTRUCTION CO. & DELAWARE COUNTY R. R. CO., *Appellants,*
vs.
LEWIS H. MEYER AND WILLIAM DENNISON, TRUSTEES, *Appellees.*
209.

Appeal from the United States Circuit Court for the District of Iowa.

The DELAWARE R. R. CONSTRUCTION CO., *Appellant,*
vs.
LEWIS H. MEYER AND WILLIAM DENNISON, TRUSTEES, *Appellees.*
210.

Appeal from the United States Circuit Court for the District of Iowa.

LEWIS H. MEYER AND WILLIAM DENNISON, TRUSTEES, *Plaintiffs in Error,*
vs.
The DELAWARE R. R. CONSTRUCTION CO.
500.

In Error to the Supreme Court of Iowa.

P. C. KENYON, Legal Printer, Des Moines, Iowa.

ARGUMENT.

I.

Our statement and brief show as concisely as possible the successive steps and facts in these three cases as they appear of record. Ours the duty now to inquire, *first*, which, the Supreme Court of the State or the Circuit Court of the United States, erred on the question of

JURISDICTION.

For the reasons following we say the State Court was right.

1. In order to removal the statute requires that the party asking or desiring the same shall "make and file a petition." This is the language of all the removal acts, and noticeably so that of March 3, 1875, section 3. In a word, no one will maintain that such removal can be otherwise asked. And while it is the duty of the State Court "when the law is complied with" by the applicant, to "proceed no further in such suit," yet this duty is not imposed until or unless there *is* a compliance with the law. A party cannot say to the State Court, "I am a citizen of another state; this is one of the cases under the Federal Statute authorizing me to ask a removal, (using the very language of the statute in all respects), I do ask it, and now your duty is to proceed no further." The statute contemplates proceedings such as are known and recognized in courts governed by well settled rules, and familiar with forms and pleadings, and not a "prairie practice" which ignores all pleadings, and administers justice by the "light of nature and the common counts."

Now when the statute says that one desiring to remove a suit shall "make and file a petition," what does it mean? Or, when the Act of 1867 (Chapter 196) says that the citizen of another state may have a removal by "making and filing an affidavit," what do we understand by such language? We answer, in the one case a *petition*, and in the other an *affida-*

vit, as known and understood in courts of justice. What is such petition? Is it a paper written by some one, as far as known, without authority, containing the name of one party to a suit, and another not a party, signed by neither, nor by anyone, nor sworn to by anyone? Will such a paper arrest the jurisdiction of the state tribunal? Must that court under such circumstances "proceed no further?" and are all proceedings after the filing of such a paper null and void? We say not—and yet this and nothing else is what counsel on the other side ask you to do in this case.

If the removal of this suit was asked upon the ground of "difference in citizenship" we concede that the petition did not need to be verified. As it was not sworn to there can of course be no claim that it was good under the "local influence or prejudice" statute. By looking at it you will find that it was neither signed nor sworn to. Is this a good petition? Is this the "making and filing" of a *petition* within the meaning of the law?

What is a petition? It is a writing or pleading well known, and the language was adopted by Congress because well known in judicial proceedings. It does not mean a motion or prayer *ore tenus* in open court. It must be "made and *filed*," and is hence an application in writing for the desired removal, stating the grounds upon which it is asked, and it must bear the name of some one, either in person or by attorney, so related to the controversy as to authorize him to pray for what is asked, and the name must be so affixed as to hold him responsible for its authorship and genuineness. Anyone can write such a paper, but not everyone can rightfully sign it. Anyone can *draft* an instrument, but such a paper as this only becomes a petition within the meaning of the law when it is *signed* by the party or his attorney. A paper unsigned, though marked filed is not a petition made and filed any more than a blank deed would be a good conveyance. It is no more a good petition for a removal than an apostrophe to the stars or quotation from Justinian. Considered as a petition under

the statute it is imperfect, incomplete, without force, merit, or meaning. And especially so where there is no claim that its being unsigned was the result of oversight, accident, mistake, and where there was no effort or proposition made to cure this most fatal defect.

You will find this so-called petition in the record, (Case 500, folio 91 ; No. 210, folio 169), and we assert that it is fatally wanting in the requisites of a petition made and filed within the meaning of the statute. If this instrument had been presented in person by the party desiring the removal, there might be some pretence that the signature was not necessary. Or if it even appeared that it was *written* by the defendants, that they wrote their names in the body of it, there might be a chance for argument that the signature at the close was unnecessary. But nothing of this kind appears. The paper unsigned, without any evidence or suggestion as to who wrote it, was marked filed (just as the clerk would ordinarily, or save in exceptional cases, file anything, bearing on the outside the names of the parties to the suit), was resurrected after the trial had commenced, and this paper without parentage, or recognized or known authorship, was so complete and authorative as to stop all further proceedings ! ! This can not be true if substantial rights are of any avail in courts of justice.

We confess that it is not a little diffcult to argue such a proposition. All our notions and ideas of a *petition* in *court* lead us to think not only that it should have a caption and state grounds for the relief asked, but that it should go further and be signed by some one who has a right, in the particular case to ask judicial interposition or action. And to argue that it is not a petition until signed is like insisting that a petition must be a petition ; that when a writing is required by law it must be a writing ; that a promissory note to be such must be somewhere signed.

The statute of Iowa provides that " Every pleading must be subscribed by the party or his attorney." (Code, 2669.)

The pleadings, forms and modes of proceedings in civil cases in the Circuit Court of the United States are to conform, as near as may be, to those in the courts of record of the state where such circuit court is held. (R. S., 914.)

If, then, this petition is a pleading, the Iowa statute is authoritative and conclusive upon the subject. We grant that it is not such in a technical sense, and yet it is a paper in writing which the law says must be "made and filed" when the party would invoke judicial action. The reasons for requiring pleadings to be subscribed are so many and obvious as to not need support by argument. And the same reasons apply with all their force to these petitions. Let us see by illustration how illogical and dangerous would be any other rule as applied to this class of cases. Suppose that no other paper had been filed than this so-called petition; that no notice or summons had ever been served; that Meyer and Dennison had not invoked any action of the court thereon, or on anything else; that the decree was entered against them just as we find in the record; that they should afterwards resist that decree on the ground that they were not in court either by notice, summons or appearance, and this paper was offered as the *only* evidence of such appearance. Or suppose that under such circumstances it was claimed that all subsequent orders and proceedings of the State Court were *coram non judice*, and void for the reason that when this paper was filed the State Court was bound to proceed no further—that its jurisdiction was *eo instante* arrested. Now would any court hold that the filing of such a paper, just that and nothing more, was an *appearance?* that it gave the court jurisdiction over the persons of the defendants, and that the decree following was valid and regular? Or would this court hold that such filing ousted the jurisdiction, and that the decree following and all titles thereunder were null and void? And yet this is just what this court is asked to hold was the effect of this blank and parentless paper.

The rule applicable (and this applies to all the points that

we make under this head) is that the jurisdiction will not be ousted, nor will the Federal Court take cognizance of the case unless the order for removal is asked or obtained in compliance with the law. The jurisdiction of one is not to be divested, nor that of the other obtained by implication, nor by a constructive, partial or doubtful compliance with the statute. As was said by SPENCER, Justice (12 Johnson, 153), if the party "is not strictly entitled to have his cause removed, the jurisdiction of the State Court should be maintained. One party has as strong a right to have the cause retained as the other can have to remove it."

2. But the order refusing the removal was right, because the so-called petition was that of *Meyer and Dennison*, when Meyer was not a party to the record.

Now, it matters not whether Meyer should or should not have been made a party. Certain it is that he was not such party at the time this paper was filed, and whether the ruling of the State Court refusing his application to be so made was right or wrong, is a question with which we have nothing to do, and one too, which this court nor any Federal Court would revise, because it is in no sense jurisdictional. He was then not a party to the record, had no right to ask the removal, and an application made by him *jointly* with another was without legal warrant, and was properly refused. If Meyer had a right to join in this application, so had any other outsider. That Meyer was a citizen of New York was quite as immaterial to the question of jurisdiction as would be the color of his hair or the cut of his coat. The court had nothing to do with him, and our rights were not to be effected by his wishes, his views, or his officious interference. How does this Honorable Court know that Dennison alone would have made this application? How do you know, indeed, that he had anything to do with it, or that it was not the act of Meyer alone? As we have seen, it was not signed or presented by either, but it may have been the voluntary offer of Meyer, thus using the name of Dennison without his knowledge. But

however this may be, the vital and pivotal point is that an application made by *two*, one of them not a party to the record, either by the prayer of the bill, by notice, or in any way, one whose right to become such was resisted and denied, is not a petition made and filed by a *party* within the meaning of the statute. The person asking the removal must be a *party to the action.* It is the *party* who has the right to a removal, and not a friend or a partner, or one who may possibly *become* such party. The law is emphatic and clear upon this subject, and its provisions are not to be extended. A petition filed by one entitled to remove a case jointly with one who has no such right because not in the case at all, is not a petition by the *party* entitled to the benefit of the statute. You cannot say that the one party of himself, and for his own interest, would make such application left uninfluenced and unaffected by the act or claim of a stranger.

To make this, if possible, more obvious, let us suppose the application rested on the "local influence" clause or section of the statute. This clause is in this application, but it is not verified by affidavit as the law requires. But suppose it was (and for the purpose of our present argument we may so treat it), and it was sworn to by both Meyer and Dennison, and that they thereby jointly asserted that: "They have reason to believe and do believe that from prejudice or local influence they will not be able to secure justice by reason of such prejudice or local influence." Would such an affidavit be good? And yet it certainly would if this application is as against the objection we are now considering. Certainly no court would hold this, for Dennison might quite consistently swear to such prejudice or influence, if Meyer was his associate—a prejudice which being against Meyer would extend to him, Dennison, by reason of the nature of the controversy and connection of his obnoxious co-trustee with it. And if such an affidavit made by Meyer and Dennison would be good for Dennison, so it would be if fifty strangers to the case should unite with him in swearing that the prejudice or in-

fluence was such that they could not secure justice. It is not the prejudice against one *a stranger* to the case jointly with one a party, but the prejudice or influence as to the party alone, the only one who has a right to speak or be heard, which the law was made to provide against. That Dennison by the interference of Meyer might have been brought into "*bad company*" cannot help his case when not in such company.

Not only so, but in this case a bond was filed purporting to be by Meyer and Dennison. The sureties undertook for them jointly. It recited that *they* had applied to remove the case and obligated the two (Meyer and Dennison) to enter in the Federal Court the record, pay costs, &c. Now remembering that it was as much our right to have the case retained as that of the defendants to have it removed, were we or the court bound to accept a bond which imposed a duty upon and extended a right to one who was a stranger to the record? If Dennison alone could make the application and give the bond he might have been unwilling or unable to do so, and we are not to have the judicial car thrown from or switched onto some other track by either prejudice obtaining against some stranger or some other citizen, or his greater ability or activity in caring for the right of the only *party*, or his greater ability to procure and give the security required by the law. It is quite enough that a party shall be required to meet and defend against the demands or claims of his adversary, without being compelled to have his case and his rights interfered with and questioned by everyone who wants to get into it, and thinks he knows best how to conduct the defense or prosecution.

3. It was properly refused because the *bond* was *not such as the court was bound to or had the right to accept.* (Case 210, folio 172.)

The objection was made that one of the *sureties on the bond was an attorney*, and had no right to enter into such an undertaking. The statute of Iowa, as we have seen, is express that

an attorney shall not be received as security in any proceedings in court. There is no Federal statute in conflict with this. On the contrary, section 914 (R. S.) leaves this as the rule, and we suppose it is quite competent for the state to make rules upon this subject for all cases and all undertakings, not in conflict with the rules and law governing the Federal tribunals. The State Court, of course, had judicial *knowledge* of who were the attorneys of the court without proof, and knowing that the name of such attorney was on the bond, it properly for this reason, if none other, overruled the application. And upon general principles no attorney should be allowed to enter into such an undertaking. No court should permit an attorney to sign these bonds, and the statute of Iowa is in most perfect accord with the highest professional ethics and the due administration of the law. That in his zeal for his client he shall not be allowed to become his surety in every instance when the law requires a bond; that there may be removed from him all temptation to use his personal as well as professional name and means to bring about a favorable judicial result, it is most meet and proper that he shall not be thus permitted to become responsible. And when a court for this reason has rejected an undertaking as insufficient, neither this court nor any other will be willing, certainly will not be swift, to say that such holding is against either the letter or spirit of the law, or those rules which should ever be maintained touching the relation of attorney to his client and the courts, and his profession. The prohibition extends (for this is the statute) not alone to an attorney in the particular case, but to *all* the attorneys of the court, for their duties are such that they should never be allowed to thus intervene or become connected with pending litigation. Their hands should ever be kept clean, and their pecuniary interests as little connected as possible with the strife of the forum.

4. The application, if ever so regular, had been *waived, and was brought to the attention of the court below too late.*

It will be seen that after it was filed a continuance was

asked, amended answers made, the *trial commenced*, and then, *for the first time*, was it called to the attention of the court. If to every other point there could be a semblance of answer, none whatever, it is believed, can be made to this. For here we have this condition of things: A paper in the name of two, one not a party, asking a removal, not signed nor sworn to, was handed to the clerk, not *brought to the attention* of the court, a continuance asked, answers filed, issue joined, the case reached for *trial*, the *trial commenced*, and then after a *part of the testimony* was introduced, the court was advised that a removal was asked. If this practice can be tolerated, then a citizen in the State Court has no right against a non-resident which any court is bound to respect. Now remember that there was no showing or pretence that the failure to sign this paper or to call it to the attention of the court was the result of oversight, mistake, or anything else, but as far as appears the steps taken were most deliberate, well planned, and for the very purpose of misleading the plaintiff and the court. They waited until a most material step had been taken in the trial; until the paper which was the *basis* of our right to recover had been offered and received in evidence, and discovering how conclusive it was as to our right, they all at once and in their *zeal and fear* of the local tribunal, resurrected the paper (worthy of no little adoration), and insisted that by this the jurisdiction of the State Court had been *arrested*, and that it could proceed no further! It cannot be that this court will hold that the jurisdiction of the state tribunal, just as ample in all matters coming within its cognizance as that of the highest court of the land, can be thus trifled or played with at the pleasure of a suitor, because he wants time or (as the Supreme Court of Iowa in this very case, 500, said,) "because he proposes to take his chances and use them at any stage of the trial. If he can do this, then he can when he finds during the trial that he shall probably be beaten, or because he is disappointed by some adverse ruling of the judge."

The law contemplates promptness in these matters, and what we maintain is that this is not met by simply putting such paper on file, even if in all respects formal and regular, but a claim for removal should be based upon and the action of the court invoked before the jurisdiction is submitted to by taking a forward step in the trial or the like.

But when the law says that the party shall make and file a petition, execute a bond, etc., and that it shall then be the duty of the State Court to proceed no further, it cannot mean that *any* petition, *any* bond, *any* papers which might be tortured into an attempt to comply with the statute if *filed*, shall *per se*, though left to sleep in the pigeon-hole of the clerk's desk *at once* oust the jurisdiction of the State tribunal, and that all its proceedings thereafter, though in total ignorance of such papers, are null and void. Nor can it mean that *ever* so good a petition and bond *thus* filed shall work such consequences or any consequences, unless called to the attention of the court before the trial is commenced. It is as though one should file a demurrer to a declaration, or to a plea, afterwards join issue, or go to trial as upon issue joined, and then during the trial, or after its conclusion, call attention to the issue of law joined by such demurrer. The alphabet of the law in pleading and practice teaches us that there is a proper time, and only a proper time, to *do* and *urge* these things, and that one may lose a right by failing to insist upon what he has asked at the appropriate moment, quite as fully as if he had not asked it at all. Where the rights of third persons are not involved, any right may be waived, and any person in a civil action may waive a benefit to which he may be entitled by law. For instance, a demurrer is waived by going to trial on the merits (11 Peters, 80), and a plea in abatement was waived by going to trial upon the plea to the merits. (4 Wall. 599.) And in a case where there was no averment of the citizenship necessary to confer jurisdiction, this was held waived under the circumstances in *Bradstrect vs. Thomas*, 12 Peters, 59. So

if one is himself a party to an irregularity, he cannot avail himself of it.

U. S. vs. Charles, 1 Brock, 380.

An implied waiver growing out of the circumstances of the case, is as effectual as an express waiver.

Rawson vs. New York, 20 Howard, 581.

And see *Long vs. Holbrook*, Crabbe, 179.

McGruder vs. U. S., 1 Dev. C. C., 21.

And so we insist that the parties waived their right to removal based upon this so-called petition and bond. We are not, of course, insisting that the right of anyone to remove can be denied or controlled by the State Court in a proper case, but we are insisting that the mere *filing* of a bond and petition without more shall not have the effect of stopping further proceedings. Such petitioners are not so panoplied with superior rights that by the mere filing of a petition, &c., they can require the court to *know* what they have done, nor can they by so filing these papers compel the court to stop and make all subsequent acts void, however much a party by subsequent acts may submit to the jurisdiction.

This point we insist upon as of the greatest practical importance in all cases of this kind. Sure we are that there can be no motive on the part of the Federal Courts to enlarge their powers or to reach out their hands to bring within their grasp cases not properly within their jurisdiction. The law as it stands is very liberal in allowing these removals, and there is no reason, whether we look to the protection of residents or non-residents, or to the just balance of judicial power between State and Federal tribunals, for extending it beyond its fair letter and spirit. But if everything filed which may be called a petition must stop the wheels of the State Court, and if a party can stand by and say nothing about such petition, but go to trial, [redacted]e and during the trial insist that it must stop, then the law is an insult to the states and their judiciary ; and negligence will be entitled to a premium

beyond the highest and most unquestioned diligence. And too, if this could be tolerated after the trial has *commenced*, then it may be at any stage, just as the case is going to the jury and even after verdict; for if the filing of a petition, &c., without more ousts and arrests jurisdiction, then all that is done after that, according to the theory of our friends on the other side, is utterly null and void. For what they claim is that when they had filed this petition and bond, their work was at an end, and it was the *duty* of the court to take notice of these papers and proceed no further. That won't do.

And we beg your Honors to bear in mind that in view of the answers filed and held so irregular and improper as that the court struck them from the files—the most anomolous character of this petition and the want of diligence in insisting upon the removal, this Court will not say that the State Court erred in the exercise of its discretion in refusing leave to file a new bond and petition. It was a plain, palpable case of trifling, of managing to get delay, and this no court should for a moment tolerate or countenance. If it had been suggested that from forgetfulness or other cause they had failed to insist upon their rights or to sign or perfect their application the case might be different. But in a case of bald and sheer carelessness, if not infinitely worse, they are not entitled to the favorable consideration of any court, but should be judged by the strictest law, and if by this yard stick they are found short they have but themselves to blame. Any other rule may be fun for them and all alike indifferent to the diligence required at every suitor's hands, but it mocks promptness, ignores legal rights, and renders possible the greatest injustice to all courts and all parties. We have the utmost confidence that such a rule will not be sanctioned in this instance. And especially so let us add (as suggested in 17th point of our brief), since these trustees submitted to the jurisdiction of the State Court, as shown by their stipulation, as to the time when the decree should be entered; in further asking the correction of that decree and appealing to the

State Supreme Court. If what preceded the decree of the State Court was not a waiver, or if they were not estopped thereby, they certainly were by the steps subsequent thereto. And when you take into consideration what was done, both before and after, we have certainly a very strong case, one which must effectually estop them from insisting that the transfer was properly made or improperly refused.

5. The application was filed too late. The law requires that such application shall be made and filed not only before the trial, but also "before or at the term at which the cause could be first tried." (Act 1875, section 3.) Dennison moved for a new trial January 26, 1875, the court then being in session, and also filed his answer. The motion was sustained on the same date, and the cause continued (folio 158). The petition to transfer was not filed until the next term. (May 19, '75, folio 170.) Was this in time? It is not, if the cause could have been tried at the previous or January term. By referring to our brief (where the Iowa statute is fully set out) you will see that actions to enforce mechanics' liens are to be tried at the first term after due and legal service of notice has been made. The defendant, Dennison, had been duly and legally served, and a default taken, and judgment rendered against him at the May term, 1874. He appeared, and moved for a new trial at the January term, 1875, at which term the cause could have been tried, and he did not then ask a transfer. The continuance was not by *consent*, but by order of court. In support of this position we refer to authorities cited in our brief, and we only beg to add that the case of *Palmer vs. Call*, 4 Dillon, 566, is, to say the least, of doubtful correctness, and if good law, is not applicable to the facts in this case. That was a bill to foreclose a mortgage which has always been recognized as an equitable proceeding. An action to enforce a mechanic's lien has never been so treated. It is entirely a creature of the statute, and was unknown either at common law or in equity. Aside from statute, and without special agreement, no equity arises for a

lien upon a building or other like contract. It is a mere incidental accompaniment as a means of enforcing payment, a remedy given by law (the statute) which secures the preferance provided for, when the party brings himself within the provisions of the law. The lien obtained is *sui generis*, and essentially different from most, if not all other, liens known to the law. And while the Iowa statute has provided that such an action shall be prosecuted by equitable proceedings (Code, 2510), yet they are, as we have seen, triable in two methods, one upon written evidence in the form of depositions and the like, and the other upon oral evidence in open court. But it will be remembered that mechanics' liens are expressly excepted from the operation of the statute which allows a trial upon depositions, or in the only mode known aside from the statute, for the trial of equitable actions. As to actions brought to enforce mechanics' liens the appearance is the *trial* term. (Section 2745.) The Iowa Supreme Court in the case cited in our brief (44 Iowa, 54), held, that while the action was equitable, it was not tried on written evidence as in cases not falling within exceptions to the statute, and as a consequence was not triable *de novo* in the Supreme Court.

6. *The case was not one which could be transferred under the statute*, which is, that when in any suit of a civil nature there shall be a controversy which is wholly between citizens of different states, and which can be *fully determined as between them* then, either one or more of the plaintiffs and defendants, etc., may remove such suit.

Your Honors, by refering to the record (case 210, folio 170), will see that the petition is entitled as a case between "the Delaware Railroad Construction Company as plaintiffs, and Meyer and Dennison, trustees, as defendants," and it is not alleged that the controversy can be fully determined as between *them*, nor is any reference made to the principal defendant, the Davenport and St. Paul Company, the claimed debtor of both parties. Now as to that defendant, the case was, as to the Construction Company, at least, at an end, for

we had judgment after personal service and appearance, and had sold the property upon which our claim was adjudged a lien. By referring also to answer of the trustees first made (folio 155), and all amendments thereto (163, 182, 189), your Honors will see that they ask nothing as against the Railroad Company, but simply deny the right of the Construction Company to a lien, or in any event, to a lien paramount to the lien of the mortgage under said trustees' claim. It was this controversy alone which they sought to transfer.

Now when the statute refers to the controversy which can be fully determined as between parties, does it contemplate a case where the *decree or judgment* to be entered *may* ultimately or fully settle the equities or rights of the parties in a given *question* or issue in a case, or does it include or mean the parties and *all of the parties necessary* to a settlement of the controversy? In other words, can a controversy between two lien-holders be transferred without including in the transfer the common debtor, the owner of the property, against which the lien is prayed? It seems to us upon the plainest principles that to allow a removal, as was done in this instance, is to split up issues, omit essential parties, and involves confusion and difficulties which must be endless in their character.

The controversy must be *wholly* between citizens of different states, and such as can be *fully* determined between them. And then it is that one or more of the plaintiffs and defendants actually interested may remove the *suit*, and not a *branch* of it. And no branch or issue in a case can be removed by itself, nor can any suit be fully determined without the presence of the main or principal party to the controversy. It is the *suit* itself and all the necessary parties which must be removed and kept before the court. Now in this very case who is the party, if possible, most directly and immediately interested in the controversy, if not the Davenport & St. Paul Railroad Company? How could the trustees have their lien recognized, whether prior or subsequent to ours, without the

presence of the debtor or mortgagor? How could any court have held that they were lienors without an opportunity being given to the mortgagor to contest their claim? What would be thought of an *original action* brought by these trustees against our clients to have fully determined the priority and validity of their respective liens, without bringing the common mortgagor into court? And yet keeping in mind that the jurisdictional question must be determined upon the record as it stood *at the time* the removal was asked, and not upon any case made by subsequent pleadings or proceedings in the Federal Court, this is just what these petitioners are attempting to do. And, too, if they could not have brought a suit in this manner in the Circuit Court of the United States, neither can they remove one from the State Courts without having before the Federal Court the proper and necessary parties.

But still again, it must be borne in mind that if the *suit* must be removed (and this is so plain as not to need further argument, especially in view of the decisions referred to in our brief,) then in order to a removal under this statute, the controversy must be *wholly* between these petitioners (co-defendants with others) and the plaintiffs. "In other words, where a controversy is wholly between citizens of different states, and can be determined as between them, the right is given to one or more of the plaintiffs or defendants actually interested in the controversy. If some of the plaintiffs and defendants are citizens of the same state the removal must be sought by all the defendants. One of several plaintiffs, or one of several defendants, cannot, in this case, remove the case. But if all the plaintiffs on the one hand, and all of the defendants on the other, are citizens of different states, then it does not require all the plaintiffs, nor all of the defendants, to remove the case, but any one or more of either may do it. But in either case, it is the *suit* that is removed, and not a part of it." (BRADLEY, Justice, in *Girardy vs. Moore*, cited in brief.) And to the same effect is the case in 4 Dillon, 277. We only

add that if the ruling below is attempted to be upheld under the act of 1866, then in addition to what we have just said we suggest that there cannot be a final determination of the controversy as to these trustees without the presence of the debtor, the Davenport & St. Paul Company,

7. *The appeal to the Supreme Court of the State was an election of remedies by these trustees, and they could not after that transfer the case to the Federal Court.*

The appeal was taken June 30, 1875, and was pending in October, when the transcript was filed in the United States Circuit Court. Nor was this appeal dismissed or abandoned. On the contrary, they continued to prosecute the same—not only until they had one decision, but by applying for and obtaining a rehearing and the final judgment of the court thereon. When the State Court refused the transfer, their plain remedy was by *certiorari* to compel it to make return of the record, and they could not appeal to the State Supreme Court and transfer at the same time. These remedies are inconsistent, for this is not a case, your Honors will bear in mind, where the transfer was allowed, and we appealed, but where it was refused, and they are pursuing both remedies, one by transfer, and the other on their *own* appeal at the same time, As we said on another occasion upon these records, "neither this court nor any other should have its time thus taken up by these fishing, speculative and double appeals (and remedies) merely because parties can get a record here and have means to employ counsel and keep their cases upon the docket."

It may be true that by contesting a case in the State Court, *after* an order improperly refusing the transfer a party does not waive his right to appeal to an appellate court of the state, and from that to this. In such a case if this court concludes that the transfer should have been made they will not enter into an examination of the merits, but reverse and remand with instructions to order the removal or transfer. But

here is a case where either remedy was quite as effectual as both, and yet the appellants kept in motion the double machinery. For if the removal was properly applied for, then the State Court was deprived of rightful jurisdiction, and the Federal Court could afford all needful and appropriate relief. Or if the Federal Court could, not then by appeal they would be quite thoroughly protected in all their rights. But is there any case holding that they may resort to both these remedies? And especially, in view of the full and ample powers conferred upon the Federal Court to enforce obedience upon the part of the State Courts and their officers whenever it is claimed that the transfer was improperly refused? (Act 1875, § 7.)

And here we beg to suggest the anomolous position in which these trustees have placed themselves, and indeed the untold complications likely to ensue from this and every like double proceeding. If this court shall hold the judgment of the Supreme Court of the State (No. 510) for reasons not applicable to the other case (210) to be right, and that under all the circumstances disclosed in the *latter record*, the Circuit Court properly refused to remand the case, then you have a valid judgment of the highest court of the state—a judgment, too, upon *appeal*—affirming our lien as paramount to their's. And this judgment and decision would be as operative, binding and conclusive upon every question decided, and all the parties as that of the Circuit Court of the United States possibly could be. Then, if you affirm the action of the Circuit Court in 210, there will remain two decrees upon the same subject matter—between the same parties, and as to their merits, upon the same facts, in their every element inconsistent with each other. Nor can these trustees reasonably or properly insist that their lien is paramount by reason of a wrongful exercise of jurisdiction by the State Court, for this they invoked by their appeal, and the affirmance of that judgment by this court, as we have supposed, makes it in all respects as rightful and binding as if no step had been taken to remove the proceedings to the Federal Court.

Now we have referred to this possible condition of things to show the very great impropriety, inconsistency, and, indeed, endless conflict and confusion to follow the double effort of these parties to avoid the judgment of the State Circuit Court. Whereas, if they had resorted to one remedy alone, all the relief to which they are entitled, if any, could have been granted, and there would have been a complete escape from the consequences to follow from conflicting judgments by courts of concurrent and equal jurisdiction. And because of this and other grounds stated, we insist that having resorted to both, the one kills the other. The death is of their own hands. Certain it is that this court will not burden a resident party *with all the costs of the two cases*. A point, however, we only suggest, and do not discuss, for we have the utmost confidence that in neither case can the attempted removal be sustained. And yet with this result as we think certain this court cannot but see that the course pursued in this instance, must, if held proper, lead to possible and indeed probable collision between Federal and State Courts, which is, of course, to be avoided. The course and practice for which we contend avoids all such collision, and the Federal Constitution and laws of Congress may still have their full effect and operation. Upon the clearest principles the remedy should have been sought in the Federal Court, and the appeal to the State Court was an abandonment of any right to transfer the record until the appeal was determined there, or, if necessary, in this court.

8. We finally insist as applicable to both cases (210 and 500), that there was no evidence that petitioners were not citizens of Iowa, which was necessary, as appears from the cases cited in our brief. Also that since the record was not filed in the Federal Court until after the *first day of the proper term*, that court erred in assuming jurisdiction. The statute is emphatic in requiring this. And we further call attention to the fact that the so-called petition not only omitted the debtor (Dav. & St. P. Co.), but *included* Meyer, as also

certain *intervenors* who were not parties to the record. Add to these objections the further one that the only cause for removal stated is that based upon local influence or prejudice, and that the petition is not sworn to, we say add this objection and how can any one escape the conclusion that the case was not removed?

This last objection we beg to call to the special attention of this court. Our claim here is that what precedes the averment as to "local prejudice" is merely preliminary to the material statement, and was not intended to be the basis for the application for removal. The allegation as to *citizenship* as there made was necessary to warrant the averment as to "prejudice or local influence." It was not intended as a substantive averment, but merely as matter necessarily preceding the real and only cause there stated. There was no necessity for stating, nor was it intended to state more than one cause. If this is not so, and it was the purpose to rely on "difference in citizenship," then to follow it with the other was not only most ungracious, but, if possible, even more, unnecessary. If in this we are right then the application most clearly should have been *verified*, and in this respect it was fatally and jurisdictionally defective. And upon such a paper, thus blind, indefinite and uncertain, to say the least, as to the ground upon which the transfer was asked, will this court, in view of all the objections urged, say that the State Court erred in saying that it did not divest or defeat its jurisdiction?

9. In conclusion, on the jurisdictional question, we submit (in case 500) that the only and final judgment rendered by the State Court never was appealed from—that the judgment from which the appeal was taken was, at the instance of appellant, set aside, and a new judgment rendered, and that hence there was nothing before the State appellate tribunal, and, therefore, nothing now before this. The appeal was from the judgment of May 22, 1875, and at their instance "a corrected, amended and reformed decree" was entered October 14, 1875, from which they never appealed. The first decree,

and the one appealed from, was thus on their own motion vacated, and could no longer furnish the basis for an appeal, for they could not appeal from *nothing or a vacated judgment.* And that in this we are right, and that they would so claim if the circumstances were changed, can be readily seen if they had appealed within six months (the time allowed by the Iowa statute) from the last decree, but more than that from the first, and we were claiming that the appeal was too late. We can well imagine with what tenacity they would claim that the last judgment was the only one remaining or of operative value, and the only one from which they could appeal. That by their own motion or action they defeat their appeal, we think but too manifest.

And in the same case it will be seen that Dennison alone appealed to the Supreme Court of the State—that Meyer is not known to that record as a party in that court, and yet he joined in the *prayer for a writ of error to this*—the *bond* recites that *both* appeal, while the *citation* includes Meyer and Dennison and the Davenport & St. Paul Co. as appellants. Will counsel please tell us who are the appellants, and how Meyer ever got into this or the court below? No, no, the case is a jumble from begining to end, and this court should, and no doubt will, affirm the judgment of the State Supreme Court. And not only affirm that, but hold that the Circuit Court for very many reasons erred in refusing to remand the case on our motion. And so believing, we come to consider 209 (and 210 also, if the jurisdictional question shall be ruled against us) upon its merits.

II.

FACTS, MERITS AND EQITIES.

And here *inprimis* we maintain that if it shall be held that these trustee were not entitled to remove the cause from the State Court, then the judgment of May 22, 1875, was final and conclusive, and estopped them or either from claiming the relief sought and decreed in case 209. This case it will

be remembered, is that commenced originally in the Circuit Court of the United States, in which they asked to foreclose their mortgage—with claim for priority of lien over the Delaware Railroad Construction Co., etc. By the decree of May 22, 1875, affirmed by the State Supreme Court *our lien* was declared *paramount to theirs*, and if that court had the jurisdictional right and power to so declare and decree, then there is an end of all these cases, so far as these conflicting liens are concerned. By the answer (folio 194-5) of the Delaware Railroad Construction Co. this decree, was set up and relied on ; exhibits were attached showing all the orders and judgments of the State Court, as also that our lien after appearance and trial on the part of these trustees was declared paramount, and it was prayed that they be barred and foreclosed all right of redemption. And referring to folio 295 you will see that the Delaware County Railroad Co. set up the same judgment and proceedings in bar of this action. So that no one will claim that this matter is not well pleaded in bar of the recovery sought by the bill of Meyer (in case 209), and if such judgment is not held to be void, then we repeat the decree in 209, so far as it declares the lien of the mortgage paramount (and this follows upon the merits in 210) must be reversed. For the jurisdiction of the State Court over the subject matter and parties (aside from the effort to transfer) cannot be denied, and this jurisdiction having attached before the bill was filed, it could not be defeated thereby. And if that jurisdiction continued until the decree of May 22, 1875, in our favor (to say nothing of that of October, 1875), then that decree is just as conclusive as if the removal had never been asked or objection made in any way to the judgment or proceeding. This point, however, will probably not be contested, and we shall not now further discuss it.

Impregnable as are our positions on the jurisdictional question, we feel that we are even more so upon the merits of these cases. (What remains of the argument relates alone to the correctness of the decrees under the evidence in 209 and 210.

The other case, 500, has in it the jurisdictional question alone.)

That we performed work for the Davenport & St. Paul R R. Co. under the contract set out, and to the amount claimed, will not be contested, and that we are entitled to a lien therefor either prior or subsequeut to the mortgage, unless the same is defeated by some provisions of the contract itself, will not, we suppose, be denied. For that we did have the contract alleged—did perform the work as charged—and were not paid therefor, and that we took the requisite steps to preserve and enforce our lien, is most abundantly shown by the record. Until, therefore, these things are denied we shall accept them as true.

What is, then, the exact attitude of these parties and their claims? We answer that we contracted in writing August 6, 1870, to grade and construct certain portions of the line of the Davenport & St. Paul R. R. Co. (to-wit: that in Delaware county), for which we were to be paid as shown by said contract; that we commenced work thereunder in September, 1870, and finished it in the same month in 1872. Within two months after the work was completed we filed our statement with the proper clerk for a mechanic's lien, showing a balance due of over $70,000.

Thus far everything appears regular enough, and nothing suggests itself as in the least likely to stand in the way of our lien, or to deprive us of this large amount of money.

But this railroad company, like most if not all others, made a mortgage—its terms were not met—the mortgagees (or trustees) want their money, and as the property will not pay both debts, they want us and all others to stand back until they are paid. Their equitable or legal right to so demand as against our claim is just what we resist.

On pages 95 to 99 of the record Your Honors will find a stipulation as to certain facts, and by referring to folio 399, you will see that the only mortgage not released is that dated July 1, 1871, executed June 4, 1872, acknowledged May 16,

1872. Look now at folios 593-4, and you will see not only the fact of the release confirmed, but also that the one executed June 4, 1872, was recorded on that day.

Thus we have the one mortgage under which they are claiming priority over our lien, and that dated July 1, 1871, *acknowledged* May 16, 1872, and *executed* and recorded June 4, 1872—all these dates being long *after* our *contract* was made, after we commenced work, and the last dates but a short time before it was concluded. All other mortgages are out of the way, and our contest is with this one alone.

1. The rulings in Iowa, and under the statutes of that state, are uniform that our lien dated from the time work was commenced and that it is good for all the work done under the contract whether before or after the making and filing of this mortgage. This will abundantly appear from the cases cited in our brief from some of which we quote as follows:

"The lien of a mechanic or one furnishing materials attaches from the commencement of the work or the furnishing of the first material under a contract, and embraces all work done or material furnished under such contract, either before or after the accruing of subsequent incumbrances on the property."

Monroe, et al., vs. West, et al., 12 Iowa, 119.

"A mechanic's lien attaches from the *commencement* of the building, and takes precedence over a mortgage executed *after* that time although the *particular work* for which the lien is claimed was not *commenced* until *after* the execution of the mortgage. The word 'improvement' in the statute comprehends the entire erection and is not limited to the constituent parts thereof."

Neilson, et al., vs. The Iowa Eastern Railway Co., et al., 44 Iowa, 71.

"Under the legislation of Iowa, mechanics and material-men are entitled to a lien on railways for their work and labor. Such lien dates from the commencement of the building of the railway, and is prior to a mortgage executed pending the building of the railway, and before the particular work was done or material furnished for which the lien is claimed."

French vs. Burlington, etc., Railway Co., 4 Dillon, 571.

To these we certainly need not add to show that for all our

work we are entitled to our lien against any mortgage made after we commenced work. This point we regard as abundantly fortified by the authorities, and shall not further discuss it unless it shall be denied.

2. But here we may anticipate our friends, perhaps, by assuming that their answer will be that we took "collateral security," and hence waived our lien. This we controvert, and upon authorities quite as applicable and conclusive as those cited to the point last above considered.

The language of the statute relied upon is as follows:

"No person is entitled to a mechanic's lien who takes collateral security on the same contract." (Sec. 1845, Rev. 1860.)

This was the statute in force when this contract was made. And construing it the Iowa Supreme Court has held:

"A party who takes collateral security on the same contract is not entitled to a mechanic's lien. (Code, Sec. 1009.) This means either a separate obligation attached to the contract named, to guaranty its performance, or it may be the transfer of property, or of other contracts, to insure the performance of the principal agreement. And in any event, the contract, promise or property taken must have been *intended* and *accepted* as collateral security before the lien could be said to be waived or defeated." (*Mervin vs. Sherman*, 9 Iowa, 333.)

"The contract between the railway company and the plaintiff provides that upon performance by the latter the former agrees to pay the latter, on the estimates of the engineer, 80 per cent. of such estimates, the residue thereof to be retained until the contract was completed. The payment on the estimates to be made every thirty days, and then follows this language: 'All the money for the work hereinbefore specified to be paid by the citizens of Delaware county.' It is insisted this amounts to taking collateral security, and thereby the right to the lien has been forfeited. It is shown that at the time the contract was made a large amount of money had been subscribed and agreed to be paid to the railway company, by the citizens of such county. But there was no assignment of, or setting apart, other than that above stated of such subscriptions to the defendant. At most, the agreement was to pay out of a particular fund, and this does not amount to an equitable assignment of the subscriptions. *Christmas vs. Russell*, 14 Wall., 84. See, also, Phillips on Mechanics' Liens, Secs. 282, 285. We feel entirely satisfied that the plaintiff did not take collateral security, and is not, therefor, deprived of the lien." (*Del. R. Construction Co. vs. Dav. & St. Paul Co.*, 46 Iowa, 412 and 413.)

Here Your Honors have the meaning of the statute as construed by the highest court of Iowa, and which, as we understand, this court under numberless and well settled decisions (not necessary to cite) will follow. There are no decisions in conflict with these, and they must be accepted, therefore, as correct and conclusive expositions of the law governing this point. It will be observed that there was no assignment or acceptance of any obligations or promises of the citizens of Delaware county, and that the Construction Company had nothing in its hands which it could enforce as against such citizens. It was at most but a declaration of the railroad company that it would set apart such obligations or taxes (or whatever was thus held) for the payment of this work. There was no legal or equitable assignment of these debts. No case can be found holding that a party has "collateral security" when it is not *under his control*, or where he has no right to enforce its collection or application. And especially in the absence of all evidence that it was *intended* by the contractor to accept the contract, property or promises as collateral security.

As was said in *Christmas vs. Russell*, 14 Wall:

"The assignee must not retain any control over the fund—any authority to collect or power of revocation. If he did, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor."

Not only so but there can be no difference of opinion upon the proposition that there can be no waiver of the lien when the *agreement* to give the security *has not been performed by the debtor or promissor.* If the debtor fails or refuses to keep the agreement, the builder or material man ought not to be bound by it, but should be and is remitted to all his rights independently of the promise to give or take such security. (Phillips on Mech. Liens, § 285). And when you refer to this record and see that the Railroad Company not only never, otherwise than by the language attached to the contract, assigned what was owing by the citizens of Delaware county,

but that said Company collected what was thus owing, and appropriated it to the payment of other debts, it is but too manifest that said Company retained control over the fund and at the same time failed to fulfill its promise, by using the fund for its own purposes, and the payment of its other debt. (We refer to folios 682, 683, 692, 725, 728, 729 and 730.) From these it will appear that so far from any control over this fund being transferred to us it was kept by the Company. And under the statute, too, found in our brief, it will be seen that this fund, when voted, was for the Company, and under its control—that no other person could draw or receipt for the same. So that in no view of the case was there such taking of collateral security as to suspend or waive our lien.

But we further insist that the clause relied on by appellees was *changed* and *modified* before the mortgage was executed and recorded, and this too for a good and valuable consideration. As already shown the mortgage was executed and recorded June 4, 1872. The agreement on the part of the Railroad Company to abandon this claim was made June 3, 1872. (To show this we refer to folios 717, 718, 726, 748, 756, 758 and 764.) From which it will appear that the Railroad Company did not expect to rely upon this clause, and that before the execution of the mortgage the same was abandoned. We had no knowledge of this mortgage at the time this contract was made, and it was entirely competent for the Railroad Company to waive any provision of the contract under which the work was done. And though the mortgage had been executed *before* the 3d of June, yet if we had no *knowledge* or notice of it at the time the modification or change was made, we were not affected by it. For though the mortgagees may have relied upon this clause at the time they took their mortgage, yet if we acted in ignorance of the existence of said mortgage by reason of their failure to file it for record or give notice of its existence, the loss, if any, must fall upon them and not upon us. It is as though we had held a mortgage upon other property of the Railroad Company and after it

had encumbered its road to these mortgages, and without notice thereof we had released our mortgage, and taken a lien upon the same road. In such a case the authorities are uniform that our second mortgage would have priority (and especially if first filed for record) over theirs, as much so as if we never had held the first mortgage. For as to the debtor and all liens of which we had neither actual or constructive notice, we had the unquestioned right to waive liens or take such as we could get. So again we insist that the trustees could not claim priority of lien.

And now we proceed to inquire what are the rights of the Delaware County R. R. Co. who purchased this property and paid a full and valuable consideration for it? This property was sold by the sheriff May 4, 1874, and on the same day the purchaser obtained the proper certificate thereof. The sheriff also (as the property was appraised and sold without right of redemption), at the same time made a deed in due form, and delivered it to the purchaser. On the 19th of January, 1875, this purchaser conveyed the property to the Delaware R. R. Co., and on the next day assigned to the company this certificate. At this time there had been no application for a new trial (that was filed January 26). Nor, of course, any appeal to the Supreme Court of the State, nor bill filed therein, nor any step taken to set aside or question the judgment or sale thereunder.

Under such circumstances, what is the law and what our rights? As will appear from our brief, the Iowa statute (in force when the judgment under which the sale was made was rendered, and when the new trial was obtained) provided that one served by publication, and who does not appear, might have the case re-tried by applying therefor within two years, etc., but that the title of a purchaser in good faith to any property sold under the judgment shall not be affected by the new trial so permitted under this statute. It was expressly held (37 Iowa, 675) that one could not be effected by the new trial, even though it should be held that the first judgment was

erroneous. As the court then said, from this conclusion there is no escape, and we may add that in perfect harmony with this legislation is a further provision of the same Code (Sec. 3199), which is that :

"Property acquired by a purchaser in good faith under a judgment subsequently reversed, shall not be affected by such reversal."

This refers to sales pending an appeal to the appellate court of the state, where there was no *supersedeas*, and, of course, leaves the title so acquired unaffected though the judgment should be ever so erroneous. (And see *Frazier vs. Crafts*, 40 Iowa, 110.) So that by the express language of the statute, and its construction by the Supreme Court of Iowa, the appellants (the Delaware R. R. Co.) were completly protected in its title as against these trustees or any other parties asking that the case be re-tried.

But we desire also to call your attention to the fact that the bill in this case (209) does not charge that this appellant (the Del. R. R. Co.) was not a good-faith purchaser, nor ask that the sale to it shall be set aside. Indeed there is no relief prayed as against said appellant, which can possibly warrant the decree "annulling and declaring for naught" the title of said company. And whatever appellees may possibly claim in argument as against appellant as to this sale, we wish to hold them to this rule—that they have alleged nothing, nor prayed for anything which can warrant the decree in this respect. No court will grant a party relief which he does not ask. For this reason this part of the decree is erroneous.

Calling Your Honors' attention to one other point (a most important one, too, and one which should have preceded some of those made), and we shall have done.

By our answer we deny that any *mortgage* was ever made as claimed by appellees or that any *bonds* were issued or money advanced or paid as in such mortgage provided. This imposed upon them the duty of establishing three most pivotal and cardinal facts. The mortgage or trust deed, if ever executed, this court will observe, was not given to secure a

then existing indebtedness, nor for money then received, but to secure bonds *thereafter* to be issued and sold. Until such bonds were made and sold the mortgage was not a lien for the essential condition upon which it was to become operative had not occurred. When a mortgage is given to secure a note or notes (reciting their execution then or theretofore) there can be no recovery without evidence as to the notes (by their production or otherwise), and certainly no less is to be required of one relying upon a mortgage to secure bonds or obligations to be *afterwards* issued. The mortgage or trust deed in all these cases is given to enable the trustees or officers of the Company to negotiate the securities in the market. They may not be issued or be put upon the market and never sold, and if so, of course the mortgage would be of no more value than if never executed. And when the execution of the mortgage and the bonds are both denied, there can be no recovery in the absence of evidence that the one was made and the other issued. In this case we affirm with but little fear that we are mistaken, that there is no *evidence whatever to sustain* the averments of the *bill in these respects*. If in this we are right these cases are all at an end, and these decrees must be reversed. Your Honors, we think, will look in vain for such evidence.

Another essential allegation of the bill is wholly unproved. It is charged that Meyer was appointed a trustee in place of Thompson named in the mortgage. Appellants' answers deny this as we have pointed out in our brief. As the bill is framed upon the theory that Meyers is the only acting trustee and alone entitled to relief, the absence of proof of his appointment is fatal to the relief granted by the United States Circuit Court for Iowa.

We would further call attention to the claim in the cross-bill for the possession of the road in Delaware county, and compensation for its use in the receiver's hands from May 5, 1875. Our brief, at the close, so plainly shows the title and and rental value, that nothing more need now be added.

And here we submit these cases. Their importance to these appellants can scarcely be appreciated. They invested their money, very large for persons in their situation, with the expectation that it would be returned to them as the estimates provided in their contract were made. In this they have been disappointed, and now after the lapse of near ten years they hope the end is near, and that they will recover at the hands of this court the justice so long delayed

GEO. G. WRIGHT, AND
JNO. M. BRAYTON,
for Appellants in 209 and 210,
and Appellees in 500.

Supreme Court of the United States

OCTOBER TERM, 1878.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY and DELAWARE COUNTY RAILROAD COMPANY, Appellants,

vs.

LEWIS H. MEYER and WILLIAM DENNISON, Appellees.

In Equity. Appeal from the District of Iowa.

THE DELAWARE RAILROAD CONSTRUCTION CO., Appellant,

vs.

LEWIS H MEYER and WILLIAM DENNISON, Appellees.

Mechanic's Lien Claim. Appeal from the District of Iowa.

LEWIS H. MEYER et al., Plaintiffs in Error,

vs.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY, Defendants in Error.

Error to the Supreme Court of Iowa, under the twenty-fifth section of the Judiciary Act.

ARGUMENT FOR APPELLEES AND PLAINTIFFS IN ERROR,

By GRANT & GRANT.

Thomas McGill & Co., Law Printers, 1107 E Street Northwest.

Supreme Court of the United States.

OCTOBER TERM, 1878.

THE DELAWARE RAILROAD CONSTRUCTION CO. AND OTHERS, APPELLANTS,

vs.

MEYER AND OTHERS, APPELLEES.

DELAWARE R. R. CO., APPELLANT, *vs.* SAME, APPELLEES.

MEYER AND DENNISON, PLAINTIFFS IN ERROR,

vs.

DELAWARE R. R. CONSTRUCTION CO., DEF'T IN ERROR.

Argument for Loomis, Meyer, and Dennison. Statement of the Pleadings and Evidence in the Cases.

By agreement of counsel, these causes, all relating to the same controversy, are heard together.

(We are under the duty of stating both pleadings and evidence anew, because, with due deference to the counsel on the other side, they have not been stated fairly or fully, and the court would find it difficult to understand the case as stated by them.)

CASE 209.—PLEADINGS.

Lewis H. Meyer, a citizen of the State of New York, (Record 209, page 1,) filed a bill in equity in the Circuit Court for the District of Iowa against the Davenport and St. Paul Railroad Company, the Davenport Railway Con-

struction Company, the Delaware Railroad Construction Company, William Dennison, his co-trustees, Birch and others, judgment creditors of the Davenport and St. Paul Railroad Company, or claiming some interest in the property, of which Meyer claimed, as trustee under a mortgage, the right of foreclosure.

Meyer averred that he was appointed a trustee in accordance with a mortgage executed and delivered on the first of July, 1871, a copy of which is annexed to the bill, marked "Exhibit B," page 12 of Record 209.

Meyer's was an intervening bill, Moses Dewitt Loomis having filed a bill as a bondholder and procured George H. French's appointment as receiver. (Record 209, p. 7.)

The mortgage sought to be foreclosed was dated 1st July, 1871, executed to Dennison and J. Edgar Thompson as trustees; (Record 109, p. 12;) acknowledged on 1st July, 1871; (Record 209, p. 20;) and recorded in Delaware county on the 7th of February, 1872, Henry Hayes recorder. (Record 209, p. 22.)

This mortgage was given to secure bonds at the rate of $20,000 per mile, *only to be issued* as the road progressed, secured on the road-bed, depot grounds, buildings, rolling-stock, machinery, franchises, and all the property of the corporation, including net income and all future acquisitions of property; including, too, all franchises of the company. (Record 209, p. 15.) The bill alleged that only 124 miles of road had been built. (Record 209, p. 2.)

The bill avers that another mortgage was made dated 1st July, 1871, acknowledged 16th May, 1872, marked "Exhibit B B," (Record 209, pp. 2, 23,) copies of mortgage under which the plaintiff claims relief.

This mortgage was recorded in Delaware county on the 4th June, 1872, and was not released. (See stipulation, Record 209, p. 102.)

There was a supplement to this mortgage, not affecting the mortgage lien, made for better security, (Exhibit C,

Record 209, p. 32,) and another supplement, (D,) made for better security, dated 1st March, 1872. (Record 209, p. 36.)

Meyer's appointment as trustee in place of Thompson, who died on 22d May, 1874, (Record 209, p. 1,) is set forth under notarial seal. (Exhibit A, Record 209, p. 9.)

The bills of Loomis and Meyer sought to foreclose the mortgage given to secure a debt of three millions of dollars. In the record, the appellants omit Loomis' bill; but that is of no consequence, as they filed a cross-bill to the bill of Loomis, (Record 209, p. 83,) setting up the intervening bill of Meyer; and Loomis, Meyer, and Dennison filed an amended bill (Record 209, p. 78) and a replication to the Delaware County Railroad Company's answer, and an answer to these cross-bills. (Record 209, p. 88.)

The bill of Meyer, as originally filed, made Dennison a defendant, and, besides the foreclosure prayed, alleged that the Delaware Railway Construction Company, among others, claimed some judgment or other lien on said mortgaged property, and averred that the mortgage lien was superior to either of them. It averred that they could not be such liens as could be enforced against the bondholders, because the sale and removal of the work done and materials furnished by said parties was impossible, from the nature of the work done, without a total destruction of the property annexed thereto. (Record 209, p. 6.) The bill avers that the Davenport Railway Construction Company agreed with the bondholders (Exhibit I, not copied in this record) to grade, bridge, and tie the road, if the local subscriptions were not sufficient. The bill prayed that the trustees under the mortgage might have a prior lien over the Delaware Railway Construction Company. (Record 209, p. 8.)

The subpœna was served on the Delaware Railroad Construction Company on 20th May, 1875, (Record 209, p. 44,) and on the June rule day, 1875, (Record 209, p. 46,)

the said company entered its appearance, and filed its answer on 27th July, 1875. (Record 209, p. 46.) The answer denied Meyer's appointment, and denied that a copy of his appointment was annexed to the bill. It set up that on 6th August, 1870, it entered into a contract to grade, bridge, and furnish the ties for that portion of the Davenport and St. Paul Railroad lying in Delaware county; that after the completion of the contract it filed its statement for a mechanic's lien in Delaware county; that in January, 1874, it brought suit against the Delaware and St. Paul Railroad Company, William Dennison and John Edgar Thompson, trustees for said bondholders; that on 9th of February, 1874, "judgment and decree" was rendered against the railroad company, and the cause was continued as to Dennison and Thompson; that on 4th May, 1874, under said judgment and decree establishing said mechanic's lien, all the Delaware and St. Paul Railroad in Delaware county was sold to R. Eddy, in trust for the said company, for $53,000; that a supplemental petition was filed in said suit, and on 22d of May, 1874, a decree was rendered against Dennison and Thompson, trustees in said suit, foreclosing their right of redemption, and declaring the paramount lien of the construction company; that Dennison appeared in said suit and obtained an order for retrial; that the same was retried in May, 1875, and the former decree affirmed, as will appear by a record thereof marked "Exhibit A."

That said railroad in Delaware county was sold on 4th May, 1874, and was not redeemed by the railroad company or any other party.

It set up, as a further defense, that the Davenport and St. Paul Railroad Company was not authorized to make the mortgages named, which were admitted, but the lien under them denied.

Annexed to the answer is Exhibit A, containing a copy of the decree of 6th February, 1874, granting a mechanic's

lien in favor of the Delaware Road Construction Company, and continuing the cause as to all the other defendants. (Record 209, page 49.) Also, the record of the decree of 22d May, 1874, reciting that Dennison and Thompson had been served with process ten days before that time; reciting that a supplemental petition had been filed and establishing the mechanic's lien and barring the defendant's right of redemption. (Record 209, page 50.)

To this answer there was a general replication. (Record 209, page 53.)

The Delaware Railroad Company appeared as a defendant to the bill of Loomis on 3d September, 1875, (Record 209, page 54,) and filed an answer to the substituted and amended bill of Meyer, (Record 209, page 72,) and, on leave, filed a cross-bill. (Record 209, page 83.)

The Delaware Railroad Company sought to make a defense to the mortgage, on the ground that it was an execution purchaser under the mechanic's-lien sale, (see answer, Record 209, page 74,) claiming to be an assignee from R. Eddy, who purchased as trustee for the Delaware Railroad Construction Company. (See their answer, Record 209, page 47.)

To the answer of the Delaware County Railroad Company there was a replication. (Record 209, page 92.)

The bill of Meyer was amended, by Loomis, Meyer, and Dennison (Record 209, page 78) charging that the deed to the Delaware Railroad Company was made because the construction company's charter was about to expire, to enable the Delaware Construction Company to maintain their title; that the parties in interest were substantially the same parties, and no consideration was paid, and the grantee took the title with full knowledge of the facts connected therewith. (Record 209, page 78.) There was a further amendment to the bill of Meyer, which is entirely omitted in the record, (see Record 209, pages 76, 79,) wherein the answers deny the allegations of such amended

bill. The amendment set out the transfer of the cause from the State to Federal courts; but as those facts all appear in the evidence in this record, and also in Record 210, we shall not trouble the court to the delay of a *certiorari*.

The cross-bill of the Delaware Railroad Company (Record 209, page 83) brings a cross-bill against Loomis, Meyer, Dennison, and Henry, receiver of the Davenport and St. Paul Railroad, setting forth that it was organized as a corporation in December, 1875; that in December, 1874, Moses Dewitt Loomis brought a suit in the Circuit Court for the District of Iowa about 17th December, 1874, and French was appointed a receiver; that in March, 1875, Henry was appointed a receiver; that afterwards Meyer filed a substituted bill of complaint for the foreclosure of a certain alleged mortgage, and, by amendment, (which is omitted,) made the Delaware Railroad Company a party, to which the said parties have answered; alleged that it was the sole owner of the property, and is entitled to the immediate possession thereof. It sets out the contract of the Delaware Railroad Construction Company, referred to in its answer; the performance of the contract; the statement of mechanic's lien; the claim of mechanic's lien; the proceedings in the Delaware court; the decree against the Davenport and St. Paul Railroad Company; the sale to Eddy as trustee; the assignment of Eddy's certificate; also, a deed from Eddy before redemption expired, and a deed from the Delaware Construction Company; that the property was sold on 4th May, 1874, was not redeemed from sale on 10th May, 1875, and thus the sheriff made a deed to the Delaware Railroad Company.

That the facts may not escape the attention of the court, we repeat them. The decree in favor of the construction company was made on 6th February, 1874, and continued as to Thompson and Dennison, who were not served with notice. The sale was made on 4th May, 1874, not only

while the suit was yet pending as to them, but before they were brought into court. A decree was made as to them on 22d May, 1874, and no sale was ever made as to them under that decree; and it is under this sale, under decree of 6th February, the Delaware Railroad Company claims.

The bill alleges that Meyer and Dennison claim to be trustees under a certain mortgage of the entire road, and have in this suit sought to foreclose the same; prays for a writ of subpœna, and for a decree for possession, and damages.

To this cross-bill, Loomis, Meyer, and Dennison all answer (Record 209, page 88) that they know nothing of the plaintiff corporation, and require proof thereof; admit the bringing of the suit by Loomis and Meyer's bill and amendment; deny that the Delaware Railroad Company has any title to the property in Delaware county; admit the contract of 6th August, 1870, with the Delaware Construction Company; deny the filing of a mechanic's-lien claim; admit that a suit was brought by the construction company against the Davenport and St. Paul Railroad Company, but Dennison and Thompson were not made parties by the service of process; admit that the Delaware Circuit Court obtained a decree on the 22d May, 1874, that the Delaware Railroad Construction Company's lien was paramount to that of Thompson and Dennison, but deny that they were parties thereto; that under said decree of 6th February, 1874, a special execution was issued, and the interest of the Delaware Railroad Company was sold on 4th May, 1874, to the said construction company or Eddy, their trustee, whereby the lien of the construction company was satisfied; that at the time of said execution, levy, and sale said trustees were not parties to the suit; that by said execution, levy, and sale the sheriff sold only the interest of the Davenport and St. Paul Railroad Company; that after said sale, on the 22d May, 1874, the Delaware Railroad Construction Company made Thompson and Dennison, trustees, parties by publication,

and took a judgment by default; that on the 23d of May, 1874, Thompson died; and that in January, 1875, Dennison and Meyer, successors to Thompson, appeared in said court, had the default set aside, and afterwards the said cause, as to said trustees, was transferred to this court, where it is now pending; and as against said trustees and bondholders there never was any judgment against the said property; they have no knowledge of any certificate or deed by the sheriff; admit there was no redemption; deny the purchase of the Delaware Railroad Company was made for any consideration paid; deny the title claimed by the plaintiff; admit that Meyer and Dennison claim to be trustees, and that Loomis claims as a bondholder.

They say that the Delaware Railroad Construction Company took collateral security on its contract to complete a portion of said railroad, and has waived all right to a mechanic's lien against the complainants; avers that the Delaware County Railroad Company is the same organization in substance as the construction company, whose charter was about to expire, and it had actual notice at the time of its purchase of the interest of the construction company in said portion of the railroad, and of all the defects in the title of said construction company, and of the complainant's rights in the property. This answer was amended, to show that Doolittle, one of the persons named, was a director in the Davenport and St. Paul Railroad Company, and a director and stockholder in the construction company, and said contract, as against the trustees, was fraudulent and void in law. (Record 209, page 88.) To this answer a replication was filed. (Page 92.)

Evidence on which the Cause was Tried.

The Record 209, page 95, says "that this cause on 29th May, 1876, was submitted to the court upon the issues joined, the Delaware Railroad Construction Company, the

Delaware Railroad Company, and Meyer and Dennison, trustees." And on Record 209, page 112, it is repeated: "So much of this cause came on now to be heard as relates to the controversy between the trustees of the mortgage set out in the petition, and the claim of the Delaware Railroad Construction Company and the Delaware County Railroad claiming, under a judgment in the Circuit Court of Delaware county, a mechanic's lien." "The cause was heard upon bill, amendments, answer, replications, cross-bills, answer, replications, evidence, and stipulation of counsel filed in this court."

It was stipulated and agreed (Record 209, page 95) between the parties that the Delaware Railroad Construction Company made a contract with the Davenport and St. Paul Railroad Company, a defendant in this suit, to grade, bridge, and furnish ties for that part of the Davenport and St. Paul Road included between the north and south lines of Delaware county. This contract is set out in Record 209, page 109, and is duplicated in Record 209, page 129. It contains the specifications of a contract to grade and construct all of the line of the Davenport and St. Paul Railroad between the north and south lines of Delaware county. The specifications name the character and price of the work, and was to be paid for in monthly estimates, reserving 20 per cent. of the estimate, and when any five consecutive miles were completed and accepted the 20 per cent. was to be paid up for that part. The contract was signed "by R. Eddy, president; M. Brayton, secretary; F. B. Doolittle, treasurer, of board of directors of Delaware Railroad Construction Company."

The last clause in the contract reads: "*All the money for the work herein specified to be paid by the citizens of Delaware county.* Signed: H. Price, President Davenport and St. Paul R. R. Co."

Not an allusion is made in the appellants' statement of this cause, nor in his brief, to this part of the terms of this

contract; yet they knew that the whole case hinged upon it, and it was the sole ground of controversy on that part of the case.

The same contract, with this waiver of a mechanic's lien, is in the lien claim itself. (Record 209, page 132.)

The testimony of Hiram Price, in relation to this contract, is set out in Record 209, page 100; that he made the contract with the construction company; that the work was to be paid for by the people of Delaware county; that he gave a very clear intimation of his meaning when he said in the contract, "All the money for the work hereinbefore specified is to be paid by the citizens of Delaware county." That is the condition I annexed to the contract, and I would not have signed it without." "F. B. Doolittle, treasurer of board of directors of the construction company, came to me at various times and wanted the railroad continued through that county, and held out inducements that they could raise sufficient funds to grade, bridge, and tie the road; and these were the circumstances that brought about the contract. I know I never would have made the contract without that condition. The contract was sent to me by the Delaware Railroad Construction Company; it did not contain that condition, but I added it before signing, and returned it."

It was admitted (Record 209, page 95) that the said contract of 6th August, 1870, was changed, by agreement of the parties, as follows (see, for this change, Record 109, page 133):

On the 1st July, 1872, the Delaware Railroad Construction Company assented to the following resolution of the executive committee of the Davenport and St. Paul Railroad Company:

"*Resolved*, That this company hereby consents and does agree to abrogate the following clause in the contract made with the Delaware Railroad Construction Company, signed August 6, 1870, to wit, the following words: 'All the

money for the work hereinbefore specified to be paid by the citizens of Delaware county,' on the condition and agreement by the said company, by a resolution of its board of directors, to abate its claim on said contract the sum of two thousand dollars in final settlement."

On the same day the construction company (Record 209, page 133) "*Resolved*, That the terms of said resolution be and are hereby accepted, and that we hereby agree to abate of our claim $2,000 in final settlement," which abatement appears in Record 209, page 132, never to have been made. Pertinent to this agreement of 1st July, is the following admissions in the agreed facts (Record 209, page 102):

"It is agreed between the Delaware Railroad Construction Company and the Delaware County Railroad Company and Lewis H. Meyer and William Dennison, *trustees in said suit*, (Moses Dewitt Loomis *v.* Davenport and St. Paul Railroad Company and others,) that the mortgage not released, and contained on pages 156 to 175 inclusive of the record, referred to in the former stipulation in this case, was recorded in the office of the recorder of Delaware county, Iowa, on the 4th of June, 1872."

It was further agreed, (Record 209, page 95,) that on 10th January, 1874, the construction company commenced a suit in the Circuit Court of Delaware county against the Davenport and St. Paul Railroad Company and others. That on 6th February, 1874, a decree was rendered against the Davenport and St. Paul Railroad Company, establishing a mechanic's lien upon the portion of the road in Delaware county, and the case was continued for service against the trustees Thompson and Dennison. On 7th April a supplemental petition was filed in said suit, which petition (see Record 209, page 157) says that on 6th February, 1874, "the above decree was rendered against the Davenport and St. Paul Company for $51,930.54 and costs, and a mechanic's lien."

It was further admitted (Record 209, page 96) that on the 17th of February, 1874, before the filing of the supplemental petition, and before any decree therein, execution was issued on the decree of 6th February, 1874, and the property of the Davenport and St. Paul Railroad Company was sold on the 4th of May, 1874, to R. Eddy, as trustee for the plaintiff in the suit.

It was also admitted that Thompson and Dennison, trustees, were served with notice by publication on 30th April, 1874, which notice was that a mechanic's lien was claimed against them, and their right of redemption would be barred. A decree was rendered on this notice on the 22d May, 1874, (Record 209, page 96, 164, 165,) reciting that the original notice had been served ten days previous to the first day of court, on John Edgar Thompson and William Dennison, trustees for certain bondholders, and they were adjudged in default; therefore it is considered that the mechanic's lien as aforesaid be established against the defendants, and the defendants were barred and foreclosed of all right of redemption to the property."

There never was any sale under this decree; no time was given to redeem.

It was further stipulated (Record 209, page 96) that on the 23d May, 1874, J. Edgar Thompson died. On the 19th January, 1875, the said property was sold by the Delaware Railroad Construction Company to the Delaware Railroad Company, for no other consideration than its own notes and for subscriptions of its members. The sheriff's deed was admitted. The various mortgages were admitted, one substituted for the other; and the mortgage under which the foreclosure was claimed was admitted to be uncancelled and recorded. The validity was denied on page 97, but admitted not to be released, and duly recorded on 4th June, 1875, page 102.

It was admitted that at the date of the execution of the contract of 6th August, 1870, under which a lien is claimed,

there were individual subscriptions made and taxes voted to the Davenport and St. Paul Railroad Company, in the aggregate $100,000.

It was admitted that Doolittle was a director and treasurer of the Delaware Construction Company up to December, 1873, and when the change was made in the contract was a director in the Davenport and St. Paul Railroad Company.

It was admitted (page 98) that the construction company was organized in June, 1870, and its charter expired in five years; that Doolittle, Eddy, Boone, Martin, Fleming, Thorpe, and Brayton were the stockholders of the construction company, and the same parties, with the addition of Hayes and Holbrook afterwards, were stockholders of the Delaware Railroad Company; that the members and stockholders of the construction company did not think they had the power to operate a railroad. The records of the various suits were agreed to be admitted, and other admissions made not material to the case.

It was also stipulated (Record 209, pages 114, 115) that the evidence of Hiram Price should be read in case 774, (the case now 210,) and the evidence before Boggs, taken in that case, should be read in this, and the record of the Delaware Railroad Construction Company *v.* Davenport and St. Paul Railroad Company *et als.* (case 210 in this court) should be read in this cause. This record (case 209, page 117) immediately follows this agreement. Such parts of it as are pertinent to the controversy are cited here. The petition (page 117) set out the contract and mechanic's-lien claim, (Record, page 129,) where the contract, with the stipulation waiving a lien and accepting a third party as payee, is set out in full. The petition (page 129) said that Thompson and Dennison, trustees for certain bondholders, have liens on said property, but the plaintiff's is paramount. It prayed for judgment that their lien be declared paramount, and the defendants foreclosed from any right of

redemption from and after sale under execution. There was a trial against the Davenport and St. Paul Company, and a decree as already named, (Record 209, page 155,) which continued the cause as to all the other defendants. (Record 209, page 156.)

On 6th April, 1874, affidavit was made by Brayton, (Record, same page,) that personal service could not be made on Thompson and Dennison. On 7th April a supplemental petition was filed as to them. (Page 157.) A notice under this was issued May 5, 1874, misprint 1875. Proof of publication is made on the same day. (Record, page 159.)

On the 6th May, 1874, the execution on the judgment against the Davenport and St. Paul Railroad Company was returned by the sheriff, (Record 209, pp. 160, 161,) stating that the property of Davenport and St. Paul Railroad Company was sold to the trustee of plaintiff, and a certificate of sale given.

On the 22d May, 1874, a decree was rendered, as already stated, against the Davenport Railway Construction Company and the trustees Dennison and Thompson by default, whereby a mechanic's lien was established against them by default, and they were forever barred and foreclosed of all right to redeem the property. (Record 209, page 165.)

On the 26th January, 1874, William Dennison filed in said court a petition, (Record 209, page 165,) wherein he averred that he was the surviving trustee in a mortgage executed by the Davenport and St. Paul Railroad Company to him and J. Edgar Thompson; that the judgment recovered on 22d May, 1874, against him and Thompson, was without personal service of process, and by publication only; that Thompson died on the 23d of May, 1874, and Dennison comes into court and tenders adequate security for costs, and prays that he may have a new trial in said cause. On the same day, 26th January, 1874, (Record, 166,) security for costs was filed, and an answer to the petition tendered, denying the allegations of the petition, and claiming that the construction company by their contract had no lien.

On the same day, 26th January, 1875, (Record, page 167,) an order was made, "whereupon it appearing to the court that the service upon said surviving trustee was made by publication only, and that he and those whom he represents are entitled to a new trial under the law, and said surviving trustee having filed security for costs satisfactory to the plaintiff, it is ordered by the court that a new trial be granted to said surviving trustee; that the answer offered by the defendant be filed, and that this cause stand continued until next term."

And after this continuance and the applicant's counsel had left the court, the record says (page 167): "And afterwards, during the further progress of said cause in said court on 2d February, 1875, at the regular January Term, 1875, and on the said day of said term, there was filed in the office of said clerk of said court a motion to strike said answer from the files, because it was not sworn to."

At the next term, on 17th May, this motion was taken up and the answer was stricken from the files; a default was asked, which was not granted. (Record 209, page 168.) On the 19th of May Dennison asked and obtained leave to file an amended answer, which was granted, and the answer filed. (Record 209, page 169.) This answer set up a complete defense of a prior mortgage of 1st July, 1871, and the agreement in the contract to accept a third party in payment for the work done under the contract under which the construction company claimed.

On the same day, 19th May, 1875, Lewis Meyer moved to be made a co-defendant, because he had been appointed a trustee in place of J. Edgar Thompson, deceased. (Record 209, page 170.)

On the same day, the 19th of May, 1875, the said Meyer and Dennison filed a petition, and bond on 20th May, (Record 209, page 171,) to remove said cause to the Circuit Court of the United States. This petition is in these words:

(Title of the cause.)

"Now come your petitioners, Lewis H. Meyer and Wm. Dennison, trustees, and state that the Delaware Railroad Construction Company, and persons who have come in as intervenors in the above-entitled cause, are citizens of the State of Iowa;

That Lewis H. Meyer is a citizen of the State of New York, and William Dennison a citizen of the State of Ohio;

That they have reason to believe, and do believe, that, from prejudice or local influence, they will not be able to secure justice, by reason of such prejudice or local influence;

That said cause can be finally determined in the United States Circuit Court for the District of Iowa;

That the amount in controversy in said cause amounts to more than the sum of five hundred dollars, exclusive of costs; and they make and file in this court a bond, with good and sufficient security, for their entering in said Circuit Court, on the first day of its next session, a copy of the record in said suit, and for paying all costs that may be awarded by the said Circuit Court, if said court shall hold that said suit shall be wrongfully or improperly transferred thereto; and also for entering special bail in such suit, if special bail was originally requisite therein; and they pray said court to accept said petition and bond, and order the transfer of said cause to the said Circuit Court of the United States."

The bond, with two sureties and affidavit of sufficiency, is in Record 209, pages 171, 172.

On the same day (Record 209, page 174) a motion was made to strike out the amended answer, and it was sustained. And thereupon the said Dennison moved to continue the cause, and the motion was overruled.

On the 21st of May (no trial up to that time) the Delaware Railroad Company filed a reply to Dennison's answer. (Record 209, page 179.)

To enable the court to arrive at the true state of this cause, we must now refer to record in the cause 210—The Delaware Railroad Construction Company *v.* Meyer and Dennison.

The record is the same in both cases; except this point the record as originally made was corrected.

In case 210 (page 68) Dennison, on the 18th of August, filed an affidavit, and moved to correct the record because it did not show that prior to the commencement of the trial of the cause, on the 21st of May, the application for the transfer of the cause was made and filed before the trial began, to wit, on 19th of May, 1875; and that as soon as counsel could be heard the defendant Dennison asked leave to amend his petition and bond for the removal of the cause to the United States court, so as to make the same conform to the opinion of the court, and for various other reasons set out in the motion. The court on that day (Record 210, pages 69, 70) granted the motion, and ordered that no execution issue until after the hearing of said motion to correct the record. If execution was issued, it was to be recalled. Time for hearing the motion set to third day of next term.

The record (see case 210, pages 111 and 112) was corrected by the court so as to read, that the cause coming on, on 21st of May, 1875, for further hearing, Meyer prayed to be made a party, on his motion filed on the 19th of May. Objection was made, because no evidence was produced to show that he was a trustee, and Meyer's motion was refused. (We suppose the court, as well as the State Supreme Court, wanted to strike first and hear afterwards, it being the usual course of equity to require proofs after issue made.)

The record then reads:

"Plaintiff now offered in evidence the contract sued on in this cause; whereupon the defendant William Dennison asked leave to file an amended petition and bond for the transfer of this cause to the United States Circuit Court.

A petition and bond for that purpose appearing to have been filed with the clerk of this court on the 20th of May, 1875, one of the regular days of the present term of court. —to wit, the 20th of May,—of the filing of the same not having brought to the court, plaintiff, by his attorney, objects that the bond is insufficient, one surety being an attorney, and not eligible as a surety on a bond in court, under the law; and further, that the application to transfer this cause is too late, the cause being now reached for trial and the trial commenced. Whereupon the court sustains the objections of the plaintiffs in this behalf; to which ruling of the court the defendant, by his counsel, excepts, and asks that his exceptions be made a matter of record, which is accordingly done; when, pending further proceedings in said cause, the court adjourns to May 22, 1875.

"And now on this 22d of May, 1875, the court proceeds with the further hearing of said cause; whereupon the defendant Dennison, trustee, now moves the court to proceed no further with the trial of said cause, and asks that said defendant be allowed to file a new bond for the transfer of said cause to the United States Circuit Court, or to deposit money for the cost of same. Plaintiff objects, on the ground that the cause is now on trial on its merits. Objection sustained, and said defendant, by his counsel, excepts, and asks that his exception be made a matter of record, which is accordingly done. Whereupon plaintiff, by his counsel, asks leave to file a reply, to the filing of which the defendant objects. Objection overruled and defendant Dennison excepts, and asks that his exception be made a matter of record, which is accordingly done." [Rather a strange "trial of a cause on its merits" before the issue is made up.]

"Whereupon (Record 210, page 113) plaintiff files a reply; and thereupon the defendant Dennison asks leave and files an amended answer, and the court now proceeds with the trial of said cause on the issues joined."

The protest of Dennison and Meyer to the court's proceeding to the trial is found in Record 209, page 179, and Record 110, page 64, in these words:

"And on the third day of this term," 20th May, 1875, "the said Dennison and Meyer filed a petition and bond,

with good and sufficient security, for the transfer of this cause; and this court having overruled said application to transfer said cause and proceeding to the trial of the same, now said Dennison and Meyer protest against the trial of this cause, and ask of the court to accept said petition and bond and proceed no further with the trial; and if any objection is made to the sufficiency of the securities, Dennison and Meyer, and each of them, offer to give additional security in that respect, or to deposit with this court such sums of money as will be ample to answer all the costs," &c.

And the court thereupon, on the 22d of May, 1875, after full notice, and overruling the application to transfer, proceeded with the trial, and rendered judgment (Record 210, page 113) that the plaintiff's lien was paramount to that of Dennison, trustee, and was established on the property described in the decree of February, 1874, and defendants forever barred of a right to redeem (without a day fixed for redemption or a sale under the decree).

The cause was transferred and the record filed in due season in the United States Circuit Court; and on 9th October, 1875, (Record 210, page 1,) and on 24th May, 1876, the Delaware Railroad Construction Company (Record 210, page 116) moved to remand the cause to the State court, for the same reason that governed the State court in part, and, among others, that the petition to remove was not signed, and that the party applying waived his right by trying the case in the State court (after protest) and appealing to the Supreme Court.

On 19th October, 1876, (Record 210, page 111,) this motion was overruled, and the Delaware Railroad Construction Company, after having filed replications, amendments, cross-bills, and taken evidence, proceeded to the trial of both causes. In case 209, page 112, is the record entry of the final decree.

Title of the cause: Moses Dewitt Loomis, Meyer, and Dennison *v.* D. & St. P. Co., Delaware Railroad Construction Company, and others:

"So much of this cause came on now to be heard as relates to the controversy between the trustees of the mortgage set out in the petition and the claim of the Delaware Railroad Construction Company and the Delaware Railroad Company." The cause was heard upon bill, amendments, answer, replication, cross-bill, answer, replication, evidence, and stipulations. The trustees under the mortgage were decreed to have a prior lien, and the judgments and deeds annulled and set aside, and a reconveyance was ordered, and appeal to this court.

In Record 210, page 112, is the decree, which says this cause, transferred from the Circuit Court of Delaware county, is heard on petition, answer, replications, evidence, and stipulations. The decree of 6th February, 1874, is annulled and set aside. The decrees of 22d May, 1874, and 21st of May, 1875, are annulled and set aside. The decree on default is set aside. The sale and conveyances made are cancelled and annulled, as of no validity against the mortgage, which is declared a prior lien to the claim of the Delaware Construction Company.

CASE 849, NUMBERED IN PLAINTIFFS' BRIEF 500 OF THIS TERM OF COURT.

This is the same case and the same record as case 210, already referred to. The record is precisely the same—containing the corrected decree on page 111.

After the court below had tried the case Dennison appealed the cause to the Supreme Court, (Record 849, page 67,) and in that court raised the objection, that the cause being transferred to the Federal court the State courts had no jurisdiction. (Record 849, page 122.) The Supreme Court held that it was their right and duty to determine on the validity of the transfer, as well as the right of the court below, and maintained their jurisdiction. They held that it was incumbent on the applicant to prove his citizen-

ship to the State court without an issue made or an affidavit denying it.

From this decree Dennison obtained a writ of error, assigning for error (Record 849, page 127): 1st. That said cause, before the rendition of said decree in the State court, was transferred to the Circuit Court of the United States for the District of Iowa, and the State court had no authority under the Constitution and laws of the United States to try said cause, and the decision was in favor of a State law, and against the Constitution and laws of the United States. 2d. That in the trial of said cause there was drawn in question the validity of a statute or authority exercised under the laws of the United States, and the decision was against their validity. 3d. The decision impaired the obligation of a contract. 4th. The plaintiffs in error claimed a right under the Constitution and laws of the United States, and the decision was against the right claimed by them.

ARGUMENT FOR THE APPELLANTS.

The first error assigned in case 209, is that the decree was not authorized by the evidence, and the equities should have been found for them, and not the appellees. This question is argued under Point II, page 15 of appellants' brief.

The order of the appellants' brief does not follow the assignment of errors, and as we desire, in as few words as their prolixities will permit, to bring their case to the attention of the court, we shall follow their brief, not their assignment of errors. The first point in that brief (page 10) is, that the appellees were not entitled to remove the cause from the State court.

1. Because the paper claiming to be a petition was never signed by any one, nor sworn to.

Barbour's C. P., 578, is cited. Petitions must be signed and *sworn to*, and signed by his solicitor and counsel. The

act of Congress of 3d March, 1875, does not require the petition to be sworn to; and as the act of Congress governs the case, the authority in Barbour is not pertinent. 2 Daniell's Chancery Practice, 1608, is referred to, but contains no authorities on the subject. The 2d of Barbour, 1603, defines, as contradistinguished from a bill, "a petition is a request in writing, directed to the court, showing some matter or cause on which petitioner prays its direction or order"; and 2 Daniell, 1605, says "a petition must be fairly written"—perhaps a printed one would do—"on paper, and, except for rehearing or appeal, is *not* signed by counsel." In so grave a matter, we trust this court will regard Daniell, who states the English practice, which this court follows, as the better authority.

The counsel cites the Code of Iowa, section 2669, that every *pleading* must be subscribed by the party or his attorney.

A sufficient answer to this is, that a petition to remove a cause from one court to another is not technically a pleading in either; and we print in Appendix a clause, section 2698, of the Code of Iowa. The court may, on motion of either, at *any* time, in furtherance of justice, permit such party to amend any paper or pleading.

The counsel cites 914 of the Revised Statutes, that pleadings in civil causes, other than *equity* or admiralty causes, must conform to the practice of the State courts.

The State court, in section 2510 of Code of 1873, (see Appendix,) says: "The action for a mechanic's lien shall be by equitable proceedings." We had supposed that all those lawyers in Iowa who had wisdom to get over prairie practice, knew that the courts had followed, in its broadest sense, the decisions often made at common law—that a paper is signed by the party offering it, if his name appears in it, whether at top, bottom, or middle.

The Supreme Court of Iowa, in its early history, had this quibble—that a paper must be signed at the bottom—brought to its attention.

In 3 George Greene's Iowa Reports, 430, Wise *v.* Ray, the court said: "If a signature is applicable to the substance of a written instrument, and is put there by authority of the party, it is good whether at the top, in the middle, or at the bottom of the instrument;" and many cases are cited to sustain the opinion of the court. We believe that this is the first time that ancient decision of the Iowa Supreme Court has been questioned.

The petition in this case is, in the precise words of the third section of the removal act of 3d March, 1875, (Record, p. 170,) a statement of this cause on Meyer's petition, filed on same day with petition of removal, entitling the cause "In the Circuit Court of Delaware County: The Delaware Railroad Construction Company *v.* William Dennison, surviving trustee," making himself, as he had a right, an intervening defendant, for which right see Code of Iowa, 1873, section 2683, printed in Appendix. On the next page (Record 209, p. 171,) is the title of the cause: "The Delaware Railroad Construction Company *v.* Lewis H. Meyer and William Dennison, trustees":

"Now come your petitioners, Lewis H. Meyer and William Dennison, and state that the Delaware Railway Construction Company and all the intervenors are citizens of Iowa; that Lewis H. Meyer is a citizen of New York, and William Dennison a citizen of Ohio; that the amount in controversy exceeds five hundred dollars, and they make and file in the court a bond with good and sufficient security, &c., and they pray of said court to accept said petition and bond, and order of said cause to the Circuit of the United States for the District of Iowa."

This is such a petition as the act requires, and, as Mr. Daniell says, a request in writing directed to the Circuit Court, stating a matter on which the petitioners pray its order. It is a sufficient designation of the cause sought to be removed, and is in the very language of the act of 3d March, 1875, which was passed the 3d March before.

2. The second point made (page 11 of appellant's brief) is, that after the petitioner Dennison invoked the jurisdiction of the court by asking a continuance; and 3, by filing an answer after. West *v.* Aurora, 6 Wallace, 139, and other cases are cited to sustain this position. West *v.* Aurora was under act of 1789, which required the party to apply to remove the cause before he filed answer. The others are none of them pertinent to the case at bar, arising under the act of 1875; and the case in 3 Central Law Journal said that if the party had called the attention of the court to the cause before the trial proceeded, he would have waived nothing. In our statement of the facts, the court observe that the record in 210 was used in this cause; and in that Record 210, page 112, the judge of court says that on 21st May, 1875, Meyer called up his motion, filed on 19th, to be made a party to the cause, and the court refused it, because he offered no proof of his allegation that he was the successor trustee of Thompson; "that the plaintiff offered in evidence the contract in the cause, and therefore William Dennison, defendant trustee, asks leave to file an amended petition and bond to transfer the cause to the United States Court, a petition and bond for that purpose having been filed on the 20th. The plaintiffs' attorney objected to the bond as insufficient, one surety being an attorney, and not eligible as surety on a bond under the law; and further, the application to transfer being too late, the cause now being reached for trial, and the trial being commenced. The court overruled the motion and adjourned. On the 22d of May, 1875, (Record 210, pp. 112, 115,) the court proceeds with the hearing of the cause, whereupon Dennison now moves the court to proceed no further with the trial, and asks that he may be allowed to file a new bond, or deposit money for the costs of the same. The court overruled him, and he excepted, and he went on with the trial under protest. The protest is on file in Record 210, p. 63, and Record 209, p. 179.

On such a question as this the decisions of this court are conclusive.

The subject has been very fully discussed in the Southern Law Review, vol. 2, page 215; 3 Southern Law Review, pages 247 and following.

The question has been decided *ex cathedra* in Gordon *v.* Longest, 16 Peters, 97, where this language is used:

"The defendant having a right to have the cause removed, under the laws of the United States, in the facts of the case, the judge of the State court has no discretion to withhold the right."

"The application having been made in proper form, and no objection having been made to the facts on which it was founded, it was the duty of the State court 'to proceed no further' in the cause, and every step subsequently taken, whether in the same court or in the Court of Appeals, is *coram non judice*."

"One great object of establishing the courts of the United States, was to have a tribunal in each State presumed to be free from local influence, and to which non-residents might resort. This object would be defeated if a State judge, in the exercise of his discretion, might deny to the party entitled a removal of the cause."

Insurance Company *v.* Dunn, 19 Wallace, 214, where this language is used:

"The company resisted the reversal of the removal, and having failed and being forced into a trial, lost none of its rights by defending the action."

"If there was error on the part of the Circuit Court in overruling the motion to dismiss, the remedy should have been sought in the Federal courts. The State courts were incompetent to give it. Their authority was at an end until the cause should have been returned, if ever, by the action of the Federal court.

"The conditions prescribed having been complied with, the act of Congress expressly required the State court to proceed no further in the cause. The further proceedings in the State court was a clear case of usurped jurisdiction. The illegality was gross. The maxim, that consent cannot

give jurisdiction, applied in full force." Citing Gordon *v.* Longest, 16 Peters, and other cases.

In Osgood *v.* Chicago, D. and V. Railroad Co., 2 Central Law Journal, 275 and 278, Drummond says:

"2. It is not a good objection," (to transfer,) "that the petition was filed in vacation, and the petition and bond were not acted upon by the State court.

"4. If the record is filed in the Federal court, and the court sees that it involves a controversy within its jurisdiction, it will retain the jurisdiction though there are irregularities in the transfer.

"6. It is not necessary that the petition should be verified."

Same case, reargued, 2 Central Law Journal, 283–85: "The act of 1875 for the first time authorized the bond and petition to be filed out of term. We think this was to prevent the State courts from proceeding in the case after the papers were filed with the clerk. It is not necessary that the case should remain until next term. The jurisdiction ceases on filing the papers. If the petitioner has brought himself within the terms of the law, the removal is complete."

In the Southern Law Review, 313–315, the acts of removal are fully discussed by Dillon, of Eighth Circuit: "The removal acts provide, that upon the filing of a proper petition and offer of good security or bond, it shall be the duty of the State court to proceed no further. The State court has no discretion, and can do nothing to affect the right, and its rightful jurisdiction ceases *eo instanti*. No order for removal is necessary, and every subsequent exercise of jurisdiction by the State court in deciding its judgments is null and void."

Insurance *v.* Morse, 20 Wallace, 454.

This court, referring to Insurance Company *v.* Dun, says: "The judiciary act of 1789 uses the words, 'it shall

be the duty of the court to proceed no further in the cause.' This act confers an unqualified and unrestrained right to have the cause transferred to the Federal court, on giving the security required. In the case of Insurance Company *v.* Dun, 19 Wallace, it was held, that no power of action thereafter remained to the State court, and that every question necessarily including its own jurisdiction must be decided by the Federal court."

And the Supreme Court of Ohio, which held out against this court, in Insurance Co. *v.* Dun, has recently, in Erie Railway Company *v.* Stenger, (Philadelphia Law Register, December, 1878, page 763,) acquiesced in the duty it owes to this court to submit such questions to this court, and sets an example which our Iowa court would do well to imitate; for the Iowa court has not heretofore been loyal in its duty to the Constitution in this respect.

Another objection (No. 3, page 11 of appellants' brief) is, that after handing the clerk the petition for removal, Dennison filed an answer. This is not true. The answer (Record 209, page 169) and petition to Meyer to become a party, (page 170,) and petition to remove, (171,) were all filed at the same time, May 19, 1875, and were contemporaneous acts.

A fourth objection (page 11 of appellants' brief) is, that the petition was not brought to the attention of the court until after the trial had commenced.

We concede, that if the appellants' attorney had been in court, it would have been polite for him to have called the court's attention to the petition.

The judge below, in deciding this point, observed that it was the duty of a court to take notice of its own records, and that if it improvidently omitted to take notice of the filing of the petition, it was his duty, when his attention was called to it, "to proceed no further in said suit," which is the language of the act of 4th March, 1875, p. 470, § 3.

Suppose the court, after a trial had began, and it was

about to enter, or had entered, a judgment by default, and his attention was called to the fact that a plea was filed, could it be a sufficient answer for the court to say the trial is begun; a motion to default is allowed; you are too late?

This question, as to calling the attention of the court to the filing a petition to transfer, has been settled by this court at this term in Yulee *v.* Vose.

When the court said, that if the court's attention was called to a reversal, during the progress of the trial, that he should proceed no further in the cause.

A fifth objection (page 11 of appellant's brief) is, that Dennison and Meyer both applied to remove, and Meyer was not a party; hence the motion was properly refused.

If Meyer was not a party, Dennison was; and the useless petition of Meyer could not waive the useful one of Meyer. If Meyer was a party, his joining in the petition was good.

A sixth reason (appellant's brief, p. 11) is, that there was but one cause of removal stated, and that was local influence, and the petition was not sworn to, under act of 1867.

But the counsel are mistaken. There were two causes for removal. The cause was fully stated under the third section of act of Congress of 1875, page 470, that the defendants were citizens of one State, and the plaintiffs of another, and the cause of action exceeded $500. The petition and bond were in the exact words of that act.

Another ground of removal was local prejudice under the act of 1867. Such a ground was properly made at the time, as it was then doubtful whether the act of 1867 (local prejudice act) was repealed by the act of 1875. It has since been held in this circuit, and perhaps in this court, that it was not repealed.

Under the act of 1875, section 3, page 470, the petition was not required to be sworn to. Under the act of 1867 an affidavit was required to remove the cause.

If it was material, to maintain the removal in this court, to rely on the act of 1867, the answer could be made, by saying that no objection was made to the petition because it was not sworn to in the State court, (Record 209, page 177,) nor in the Circuit Court, (Record 210, page 116,) nor in the record of the court's judgment as amended; (Record 210, page 112;) and the motion of waiver applies with more force to the other side,—for no objection can be entertained in this court that was not made below. Perhaps this rule does not apply to jurisdictional questions, but it is a sufficient answer to say, that if, in the Circuit Court, such an objection had been made, an amendment would have been allowed.

Objections 7 and 8, (pages 11 and 12 of appellant's brief,) that the Davenport and St. Paul Railroad Company is a necessary party, because it was the mortgagee and an indispensable party. The appellants have answered this argument by the record. They have tried this cause in their lien claim and cross-bill, Record 209, page 83; as to cross-bill and Record 209, page 112 of the judgment, without requiring the railroad to be a party.

They filed a cross-bill against Loomis, Meyer, Dennison, and Henry, receiver, and did not make the Davenport and St. Paul Railroad Company even a nominal party, much less ask any relief of them, in cross-bill filed 6th December, 1876. In this cross-bill they claimed title and possession of the property in dispute, by virtue of a superior lien to the bondholders.

This cross-bill not only proves that there was a controversy under the last clause of section 2 of act of 3d March, 1875, p. 470, which was wholly between citizens of different States, which was removable under that act by either party, but that the appellants voluntarily went into the Circuit Court, and by their cross-bill gave the Federal court jurisdiction of that controversy by their own application to the court.

The Record 209, page 112, says: "So much of this cause came on to be heard as relates to the controversy between the trustees of the mortgage set out in the petition, and the claim of the Delaware Railroad Construction Company and the Delaware Railroad Company claiming, under a judgment in the Circuit Court of Delaware county, a mechanic's lien. The cause is heard on bill, &c., cross-bill, answers, &c."

This is an argument *ad hominen* which cannot be resisted.

The authorities cited in no manner sustain the question in hand. 16 Wallace was a trial of right of property on execution after judgment. 1 Peters was that Congress alone has power to regulate proceedings in the Federal courts. The cases in 46 Iowa were *coram non judice*, and no authority anywhere. 21 Wallace was on several defendants transferring under act of 1867, referring to the sewing-machine cases; and 4 Dillon was under a occupying claimant's law, after a judgment in the State Court.

The second section of act of 1875 (page 470) was intended to remedy the objection made under the act of 1867, under the sewing-machine cases; and it provided, that where in any suit mentioned under that section there shall be a controversy which is wholly between citizens of different States, and which can be determined between them, either one or more of the plaintiffs or defendants may remove the suit."

In the opinions quoted in our brief on the question of jurisdiction, we cited 3 Southern Law Review, 249, quoting from Mr. Justice Miller, where it is said: "The cause will be removable by either party if there is a substantial litigation between citizens of different States, though there be a common citizenship between some of the litigants, plaintiffs or defendants." This is Mr. Justice Bradley's construction of the Constitution. (Lockhart *v.* Horn, 6 Wood's C. C., 628.)

In Osgood *v.* C. D. & V. Co., 2 Central Law Journal,

275: "A suit where the real controversy is between citizens of different States can be transferred, though other parties may intervene, citizens of the same State in which the suit is brought."

In Arapahoe County *v.* Kansas Pacific Railroad, cited in 2 Southern Law Review, 315, and reported in 4 Dillon, the Justice said: "The cause will be removable if there is a substantial litigation between citizens of different States, though there be a common State citizenship between some of the litigants, plaintiffs or defendants."

Applying these principles to this case, the Delaware Railroad Construction Company claimed a mechanic's lien against the Davenport and St. Paul Railroad Company. That was one independent question, affecting those two parties only.

The Delaware Railway Construction Company claimed a prior and superior lien to the mortgagees, and that was a separate and independent question between them, and in no way auxiliary to the first suit. Each could be, and, as the record shows, were, decided separately and independently of each other; and on the latter question, the last clause of the second section of the act of 1875 is imperative that the cause can be transferred. The ninth point (page 12 of appellants' brief) is that no evidence was furnished; that the petitioner was not a citizen of the State of Iowa.

22 Wallace, 328, is cited. It was a case where records were lost by fire, and the court was speaking of the proof of lost records, and it held, that in the absence of all proof to the contrary, that the citizenship requisite to give the court jurisdiction, the court will presume that jurisdiction was shown in some proper manner. The 46th Iowa is cited, which is this cause, where the court was deciding *coram non judice*, and its decision is void.

Dillon, in 2 Southern Law Review, 313, says the 46th New York is not good law. The court, in 46 New York, was speaking of averments, not proofs.

It is never necessary for a party who alleges citizenship to prove it, until it is denied by a proper pleading. If the petition for the removal was a petition in the language of the law, there was nothing for the State court to decide. The jurisdiction ceased the instant the paper was filed. The State court had no authority to decide, on the sufficiency of the papers, the truth of the facts alleged or sufficiency of the bond. All these questions belonged to the Circuit Court. On the motion to remand cause 210, (Record, page 116,) there was no objection made as to the citizenship, and no issue was tendered to that court.

The mode of making this issue has been prescribed by this court ever since 1st Peters, 476, De Wolf *v.* Renauld, where it is held, "that a question of citizenship as to the parties cannot constitute a part of the issue in the main cause. It must be brought forward by a proper plea in abatement."

It is hardly necessary to add that no issue of citizenship was ever tendered in any part of the pleadings.

The question was raised, like a large majority of the questions made in this cause, as a technical quibble, to get the cause out of the Federal court. And so the tenth, eleventh, and twelfth points of appellants are of a like character: 10. That Dennison appealed to the Supreme Court after he had failed to get the State court to admit his transfer; 11. That Meyer was not a party to the record; and 12. That the petition misdescribed the cause. Why do the appellants come here, if the cause pending is not a controversy with them?

Objection thirteen (page 13): That the petition for removal sets out two grounds of removal, under act of 1867 and act of 1875. There was no objection to that if both acts were in force; and if only one act was in force, and the petition was proper under that, the useful was not vitiated by the useless.

The fifteenth objection (page 13) is, that after final judg-

ment against the defendant, and owner of the property, the suit was not removable to the Federal court upon the application of any one lienholder, in a controversy between him and a party obtaining the final judgment. 21 Wallace and 19 Wallace are cited, which were under the act of 1867, in which this court held that the whole cause must be removed. To remedy this, the last clause of section 2 of act of 1875 was passed: that in a civil suit where there was a controversy wholly between citizens of different States, which could be tried as to them, the cause could be removed.

Seventeenth objection: The record was not filed in the Circuit Court on the first day of the next term, it being filed on the 8th instead of the 9th of October. Answer: No exception was taken to that in the court below; second, if it had been the court would not have dismissed the suit, nor even required the party to show diligence, and the delay caused by the clerk, as it was on the first pleading day of the term. No court, under the act, is authorized to dismiss the suit; but if the party was put to expense thereby, his remedy was on the bond, which was executed for that purpose. No such point was made in the motion to remand. (Record 210, page 116.)

The eighteenth objection, (page 14 of brief,) is, that the bond is not such as the law requires. It was signed by an attorney. The law of Iowa is cited. No such motion was made in the court below. (See motion to remand, Record 210, page 116.) The bond was signed by two persons. (see the bond, Record 210, page 56): "C. Whitaker, John E. Henry, sureties." The motion to dismiss raises no such objection; it was a technical one. If there had been any reason for it, a new bond would have been accepted. There is no evidence that one of the sureties was an attorney. There was no motion in the Circuit Court for any such reason against either surety; and the homily of the argument paper on this subject might have been spared,

and the time occupied with more important matters. Such a question is not appealable.

The nineteenth point (page 14 of brief): That application should have been made at the prior term of the court.

The statute of Iowa about the trial of causes is cited. Perhaps the State of Iowa can regulate the removal of causes in the Federal courts, but this court has to change its opinions first. Under the act of 1867, the cause was removable at any time prior to the trial, and by a decision of this court, after a new trial. The act of 3d of March, 1875, page 470, was not passed at the January Term, 1875, when Dennison filed his petition to set aside the default, and the May Term was the first term at which a cause could be removed under that act, which refers to cases then pending or thereafter to be brought.

A twentieth objection (page 15) says that after the appeal to the State court in 500, the record was amended and the decree corrected. Therefore the amendment vacated the appeal decree, and therefore there was nothing before the Supreme Court. The Supreme Court of Iowa, in 849, affirmed the decree of the court; and no matter what it was, original or amended, it was the subject of an appeal, because the courts of the State had no jurisdiction in the cause whatever.

A twenty-first objection is a misrecital on the bond of appeal in case 849. Well, if there is any misrecital in the writ-of-error bond, let us correct it. It is not a ground of error to reverse a cause.

Section II of appellant's brief, page 15.

This argument applies to bill and cross-bill No. 209.

Second point: That the lien of the construction company was superior to that of the mortgagee's dated 1st July, 1871, we cite Record 209, page 13; that they are executed to secure a debt of $20,000 per mile of road, to run and equip the road; that they are intended as a first lien on the property.

The answer of the construction company (Record 209, page 47) denies the execution of the mortgages. The answer of the Delaware Railroad Company (Record 209, page 72) admits their execution. The agreed facts (Record 209, page 97) admit the execution of the mortgages; and there is, in Record 209, page 102, a special agreement that the mortgage sought to be foreclosed was not released, and was recorded in Delaware county on the 4th June, 1872. A mortgage acknowledged and recorded is admitted in evidence, without further proof of execution. It was noted from that date, and the other mortgages notice from the date of their recording.

The contract under which the lien is claimed is dated on 6th August, 1870, (Record 209, page 129,) and was filed as a lien claim on 20th December, 1872.

The contract says (Record 209, page 132): "All the money for the work specified in said contract is to be paid by the citizens of Delaware county."

And for $2,000 this clause was abrogated on the 1st July, 1872, after the mortgage was recorded June 4, 1872. H. Price, who signed the contract as president for the railroad company, says (Record 209, page 100) that citizens of Delaware county, among them Doolittle, the treasurer of the construction company, proposed to raise sufficient funds to grade, bridge, and tie the road, and under these circumstances he made the contract, and put that condition into it, and would not have made the contract without it. It is admitted (Record 209, page 97) that at the time of the execution of that contract there were individual subscription taxes voted in Delaware county to the amount of $100,000 to the stock of the railroad company; that all the money paid on said contract was from such subscriptions, and that Doolittle (Record 209, page 101) was authorized to receive said subscriptions, and none of the money was received by the railroad company.

The question is,—Does this contract to take a third party

absolutely in payment of the debt created by the contract, waive a mechanic's lien?

Upon general principles, such a contract is not only a waiver of a lien, but a waiver of any right to collect the debt from the contracting party.

No action could be maintained at law or in equity against the railroad company on that contract as it then stood, and as it was up to the change in the contract, after the mortgage was recorded.

The statute of Iowa provides, Code 1873, sec. 2129 (see Appendix): "No person is entitled to a mechanic's lien who takes collateral security on the same contract."

Collateral security means security by the side of or in addition to the principal obligation. This was the highest sort of additional obligation. It was a complete waiver of the obligation of the debtor, and an agreement absolute and without qualification to take a third party in payment. It was not such a case as cited in Phillips on Mechanic's Liens, sec. 285, where it is said a mechanic's lien is not waived by an agreement to give collateral security; is not performed, as an agreement to take the owner's note with an indorser, which is not given.

In this case there was nothing for the railroad company to do. The parties making the contract agreed to look to a third party for payment, without requiring the debtor to do anything whatever to procure the obligation.

This case, 46 Iowa, is cited as a State court interpretation which this court must follow. This is not the first time a State court has undertaken to make a *post facto* interpretation to influence this court. This cause before the Supreme Court of Iowa is No. 829 here, and was, from the time of its transfer to the Circuit Court, *coram non judice*. Its judgment is void. It comes within the mischief against which this court in 16 Peters says the Constitution provided by erecting Federal courts free from local influence.

In the court below it was conceded that this view of the

contract was correct; but it was argued that the abrogation of this clause, by the resolution of July 1, 1872, after the mortgage was recorded, restored the mechanic's lien from the beginning, and made it override the mortgage, which was recorded before the abrogation. The court below reasoned otherwise,—that a lien once waived could not be restored; (Philips on Mechanic's Liens, sec. 327;) but if restored, the restoration could not relate back and defeat the recorded mortgage. Points three and five, (pages 16 and 17 of appellants' brief,) that there was no proof of indebtedness under the mortgage, is answered by saying, that for this trial at least the mortgage itself was sufficient evidence of a debt; and in this controversy there was no question about amounts of liens.

The execution of the mortgage is admitted, and that certainly is sufficient in this controversy. A fourth point under this head (Brief, p. 16) is made by the Delaware Railroad Company. It claims a title as a *bona-fide* purchaser under the judgment of 6th February, 1874, and the sale to Eddy as trustee on 4th May, 1874, under sections 2877 and 2878 of the Code of 1873. See these sections, in Appendix.

The language of them is, that where a judgment has been rendered against a defendant or defendants, "served by publication only," and who do not appear, such defendant may at any time, within two years, appear in court, have the action retried and admitted to defend, and retry the action as if there had been no judgment.

The title of a purchaser in good faith, under such a judgment, except the title obtained by the plaintiff and not bought of him in good faith by others. To the first point under section 2877, we have a very complete answer. It is short and conclusive: there never was any sale under such a judgment. There was a new trial granted on the judgment against the non-resident trustees, which was rendered on 22d May, 1874, three weeks after the sale under the judgment rendered on 6th February, 1874.

Let us try it by the record: A petition was filed on 15th January, 1872, (Record 209, p. 217,) by the Delaware Construction Company against the Davenport and St. Paul Railroad Company, Thompson and Dennison, trustees, and others; the process was served on the railroad company (Record 209, p. 145) only; the case was tried as to them only; and "the cause is, by order of court, continued as to all the defendants, except the railroad company, and judgment as to them." (Same page.) Execution was issued on 17th February, 1874, against the railroad company only. (Record 209, p. 161.) The levy was made on that day, and the sale was made on 4th May, 1874.

On the 7th of April, 1874, when the execution on the 6th February judgment was in the sheriff's hands, a supplemental petition was filed against Thompson and Dennison. A publication was made on 30th April, 1874, (Record 209, p. 159,) and there was a judgment against the trustees on 22d of May, 1874, (Record 209, p. 164,) which was eighteen days after the execution sale on the judgment against the Davenport and St. Paul Railroad Company on the 6th of February, 1874, and Thompson died on the 23d of May, 1873. (Record 209, p. 96.)

This record shows that the sale under which the Delaware Railroad Company claims was made before the judgment by default on the 22d of May, 1874, and on a prior judgment of 6th February, 1874, to which the trustees under the mortgage were not parties, and the provisions of sections 2877 and 2878 of the Iowa Code made no application, and do not control. It stands, then, as a sale under a general judgment, where the trustees were not parties or privies, and which conveys no title against their lien recorded on 4th June, 1872, before the rendition of the judgment under which the plaintiff in the cross-bill complains.

For another reason the title claimed in the cross-bill is of no validity against the trustees. The Delaware Railroad Company was not a *bona-fide* purchaser under section 2878.

The title under the sale of 4th May, 1874, was made to the plaintiff in the suit. The sheriff's return so says (Record 209, page 64)—"sold to R. Eddy, treasurer of said plaintiff, in trust for said plaintiff,"—and was assigned to the Delaware Railroad Company, a corporation created for the benefit of the construction company, and was composed chiefly of the same parties, who paid no consideration whatever for the property, except their stock notes in the new company, and the note of the new company to the old, which was never paid, but surrendered. (Record 209, page 98, agreed facts.)

The attorney in both cases was also a member of each company, as well as a stockholder.

The Delaware Construction Company could not be a *bona-fide* purchaser under the sale of 4th of May, because it was not a sale by default after publication. No sale under 4th of May, 1872, under any judgment rendered after that, could make a *bona-fide* purchaser against the recorded mortgage on 4th June, 1872, which was by both the general recording acts and the special act in relation to railroad mortgages a "notice to all the world" of the lien created thereby.

Points 9, 10, and 11 (Brief, page 19) are fully considered.

Point twelve (page 19 of brief): What has the law about voting a tax to build a railroad tax, which was only a part of the subscription by the people of Delaware county, which is referred to in the contract, to do with "All the money for the work hereinbefore specified is to be paid by the citizens of Delaware county"? There was nothing for the Davenport and St. Paul Company to do after that. Now, when and how the construction company performed their contract,—whether it was to be paid monthly or when five miles of work was done,—the railroad company was not required to pay for it, or to provide for payment. The contractors were to collect the money themselves.

If Doolittle, the treasurer of the construction company,

(Record 209, page 193,) was a director in the railroad company, and was treasurer of the construction company, (Record 209, page 194,) and he paid various things with the moneys he collected,—right of way, engineers, and the construction company,—he was not a director in the railway company in 1871. Price, in his evidence, (Record 209, page 101,) says Doolittle was authorized to collect the tax, and that he ordered it paid to the construction company; that he gave Doolittle (Record 209, page 101) no authority to waive any rights of the railroad company under the contract, and this sufficiently answers Point 13 of appellant's brief, page 20.

Under section III of appellant's brief, page 21, it is argued, as to 209, that there was a total absence of proof of Meyer's appointment. This is of no importance, because the bill was well maintained by Loomis, a bondholder, or Dennison, a trustee, who became a party plaintiff and amended the bills of Loomis and Meyer. (Record 209, page 78.) But the Delaware Railroad Company, in their cross-bill, make Loomis, Meyer, and Dennison, trustees, and Henry, the receiver, parties, and pray relief against Meyer and Dennison, *trustees;* (Record 209, page 86, folio 352;) and Loomis, Meyer, and Dennison all answered this cross-bill, setting up Thompson's death, which was admitted on agreed facts. (Record 209, page 96.) The relief was properly asked by either of the plaintiffs.

There is another equally conclusive.

The allegations in bill, answer, cross-bill, or other pleadings of a party are always evidence against him, and need not be proved.

The appellants, in their cross-bill, bring a counter suit against Meyer and Dennison, and aver that they are trustees under a mortgage, and pray relief against the right claimed by them as trustees. (Record 209, p. 86.) The allegation that Meyer and Dennison are trustees is admitted in the answer to cross-bill. (Record 209, p. 91.)

That Meyer is a trustee is admitted in the agreed facts. It is hereby stipulated between the complainants, Lewis H. Meyer and Wm. Dennison, trustees, and the Delaware Railroad Construction Company (Record, p. 95): "That Thompson and Dennison, trustees, were served with no notice; that Thompson died on 23d May, 1874." (Record 209, p. 96.) And again (Record 209, p. 102):

"It is agreed between the Delaware Railroad Construction Company and the Delaware Railroad Company and Lewis H. Meyer and William Dennison, trustees in said suit," &c.

Here is an admission of the fact of Meyer being trustee and Dennison being a party, which requires no evidence of the fact, and any proof thereof dispensed with.

We contend, 1st, that the suit was properly transferred to this court in form and manner as prescribed by the act of 1875.

2. That it is properly tried.

3. That the cross-bill waives any objection to the transfer.

4. That all acts of the State court after the transfer are *coram non judice*, and void.

5. That 209 and 210 should be affirmed, and 849 reversed.

GRANT & GRANT,

For Appellees in 209 *and* 210, *and Appellants in* 849.

APPENDIX.

LAWS OF IOWA.—*Code of* 1873.

Section 2677. "If a pleading be not verified, it may be stricken from the files; but such defect shall be deemed waived if the other party respond thereto, or proceed to trial without such motion."

Revision of Laws of United States.

Section 914. The practice, pleadings, and forms and modes of procedure in civil causes other than equity and admiralty causes, shall conform as near as may be to the practice in the State courts.

Code of Iowa, 1873.

Section 2510. The action for a mechanic's lien shall be by equitable proceedings.

Section 2689. The court may, on motion of either party, at any time, in furtherance of justice, and on such terms as may be proper, permit such a party to amend any pleadings or proceedings.

Code 1873, section 2129, page 385: "No person is entitled to a mechanic's lien who takes collateral security on the same contract."

Code 1873, copied from section 1389 of Code of 1866, and chapter 20 of 10 General Assembly.

Railways. Of Stock and Debts.

Code 1873, section 1283, copied from section 1389 of Code 1860, chapter 20 of 10 General Assembly. "Any such corporation [railway corporation] shall have power to issue its bonds for the construction and equipment of its railway in sums not less than fifty dollars, payable to bearer or otherwise, and bearing interest at a rate not exceeding ten per cent., and make the same convertible into stock, and may sell the same at such rates or prices as is deemed proper. If such bonds are sold below the par value thereof, they shall nevertheless be valid and binding, and no

plea of usury shall be allowed such corporation in any action or proceeding brought to enforce the collection of said bonds. Such corporation may also secure the payment of said bonds by executing mortgages or deeds of trust of the whole or any part of its franchises or mortgages."

Section 1284. "Said mortgages or deeds of trust may by their terms include and cover not only the property of the corporation making them at the time of their date, but property, both real and personal, which may thereafter be acquired, and shall be as valid and effectual for that purpose as if the property were in possession at the time of the execution thereof."

Section. 1285. Said mortgages or deeds of trust shall be executed in such manner as the articles of incorporation or by-laws of the corporation may provide, and shall be recorded in the office of the recorder of each county through which the railway corporation may run, or in which any property mortgaged or conveyed by such deeds of trust may be situated, and shall be notice to all the world of the rights of all the parties under the same; and for this purpose, and to secure the rights of mortgagees or parties under deeds of trust so executed and recorded, the rolling-stock and personal property of the company belonging to the road and appertaining thereto shall be deemed a part of the road; and said deeds and mortgages so recorded shall have the same effect, both as to notice and otherwise, as to the personal as to the real estate covered by them.

Code 1873. *Intervention.*

Section 2683. Any person who has an interest in the matter in litigation, in the success of either party, may become a party to an action between other persons, either by joining the plaintiff in claiming what is sought, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both, either before or after issue has been joined in the cause, and before the trial commences.

1879
10-457 Field.

SUPREME COURT OF THE UNITED STATES.

Cases 29, 30, 260.

Oct. 29. 1879

OCTOBER TERM, 1879.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY, AND DELAWARE COUNTY RAILROAD COMPANY, *Appellants.*
vs.
LEWIS H. MEYER AND WILLIAM DENNISON, *Appellees.*
209 of Oct. Term, 1878.
29 of Oct. Term, 1879.

Appeal from the Circuit Court, for the District of Iowa.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY, *Appellant.*
vs.
LEWIS H. MEYER AND WILLIAM DENNISON, *Appellees.*
210 of Oct. Term, 1878.
30 of Oct. Term, 1879.

From the Same Circuit.

MEYER & DENNISON, TRUSTEES, *Plaintiffs in Error.*
vs.
THE DELAWARE RAILROAD CONSTRUCTION COMPANY, *Defendant in Error.*
500 of Oct. Term, 1878.
260 of Oct. Term, 1879.

Error to the Supreme Court of Iowa.

Argument on the Question of the Transfer of Causes, under Act of March 3, 1875.

GRANT & GRANT, *Solicitors,*
For MEYER & DENNISON.

FILED , 1879.

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SUPREME COURT OF THE UNITED STATES.

Cases 29, 30, 260.

OCTOBER TERM, 1879.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY, AND OTHERS,
Appl'ts & Defendants in Error.

vs.

LEWIS H. MEYER AND WILLIAM DENNISON,
Appellees & Plaintiffs in Error.

Brief on the Transfer of Causes, under the Act of March, 3d, 1875, from the State to the Circuit Courts of the United States.

There are four Acts of Congress, general in their nature, which provide for the removal of causes from the State to the circuit courts of the United States.

First, the twelfth section of the Judiciary Act of 1789; (1 Statutes at Large, 79): that section authorized a removal "by the defendant" alone, where a suit was commenced in a State court "by a citizen of the State in which the suit is brought against a citizen of another State." There was no right given to a plaintiff to remove the cause, because he voluntarily selected the State court, and the resident de-

fendant in such case was not given the right to remove such a case, because it was not supposed he had any grounds to remove the cause.

The time of removal under the Act of 1789 was, when the defendants entered their appearance in the State court. The mode of removal was (twelfth section of Act of 1789,) by "petition, and offer of good and sufficient security for "removing the cause, entering special bail if required, and "filing a copy of the process against him; thereupon it was "the duty of the State court to accept the surety and pro-"ceed no further in the cause." The amount to justify the transfer was in this and the subsequent acts, the same, five hundred dollars.

This part of the Judiciary Act of 1789 remained without alteration until the Act of 27th July, 1866, (14 Statutes at Large, 306,) which provided, that in a suit begun in a State court, against an alien or by a citizen of the State in which the suit was brought against a citizen of another State, and there could be a final determination of the controversy so far as the suit concerned him without the presence of the other defendants, the alien or citizen of another State, might at any time before final hearing of the cause, file a petition to remove the cause as against him into the Circuit Court of the United States and offer good and sufficient surety for his entering his appearance, and copies of the process against him on the first day of the next term, and thereupon it should be the duty of the State court to accept the surety and proceed no further in the trial of the cause against said defendant.

The third Act of Congress soon followed this, on the 2d March, 1867, (14 Statutes at Large, 558,) which provided, that when a suit was pending or might be brought in any

State court in which there was a controversy between a citizen of the State, in which the suit was brought and a citizen of another State, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit, that from prejudice or local influence, he will not be able to obtain justice in such State court, may at any time before final hearing or trial of the suit, file a petition for the removal of the suit, into the next Circuit Court and offer good and sufficient surety for his entering in such court, on the first day of its session copies of all process, pleadings, depositions, testimony and other proceedings in said suit, &c., and it shall be thereupon the duty of the State court to accept the surety and proceed no further in the suit.

These acts are in substance copied in section 639 of the Revised States of the United States.

The fourth Act of March, 3d 1875; acts of that year, page 470, which provided:

§ 2. "That any suit of a civil nature, at law or in "equity, now pending or hereafter brought in any State "court, where the matter in dispute exceeds, exclusive of "costs, the sum or value of five hundred dollars, and aris- "ing under the constitution or laws of the United States, "or treaties made or which shall be made under their "authority, or in which the United States shall be plaintiff, "or petitioner, or in which there shall be a controversy be- "tween citizens of different States, or a controversy between "citizens of the same State, claiming lands under grants "of different States, or a controversy between citizens of a "State, and foreign States citizens or subjects, either party "may remove said suit into the Circuit Court of the United "States, for the proper district, and when in any suit men-

" tioned in this section, there shall be a controversy, which " is wholly between citizens of different States, and which " can be fully determined as between them, then either one " or more of the plaintiffs or defendants actually interest- " ed in such controversy may remove said suit into the " Circuit Court of the United States for the proper district."

§ 3. That when either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in section 2, shall desire to remove such suit, he or they may make and file a petition in such suit in the State court before or at the term at which said cause could be first tried, and before the trial thereof for the removal of such suit; and shall make and file therewith a bond, with good and sufficient surety for entering in such Circuit Court, on the first day of its next session, a copy of the record in such suit, and for paying all costs that may be awarded by the Circuit Court; if it shall hold that such suit was wrongfully or improperly removed thereto, and also for appearing and entering special bail in such suit—it shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit."

What has been decided under these acts.

1. The power of Congress to pass these acts has been settled by various decisions of this court.

Gaines *vs.* Fuentes, *et al.*, 92 U. S. Reports, 10.
Sewing Machine Cases, 18 Wallace, 553.
Railway Co. *vs.* Whitton Admr., 13 Wallace, 270.

2. The Act of 1789, section 12, only authorized the defendants to remove the cause, and all of the defendants, and all the plaintiffs except nominal parties must be citizens of different States.

Beardsley *vs.* Torrey, 4 Washington, 286.
Ward *vs.* Arredondo, 1 Paine, 410.
Hubbard *vs.* R. R. Co., 3 Blatchford, 84.
Smith *vs.* Rines, 2 Sumner, 338.
Browne, *et al.*, *vs.* Strode, 5 Cranch, 303.
Wormley *vs.* Wormley, 8 Wheaton, 421.
Wood *vs.* Davis, 18 Howard, 467.
Coal Co. *vs.* Blatchford, 11 Wallace, 172.
Davis *vs.* Grey, 16 Wallace, 220.
Knapp *vs.* Troy & Boston R. W. Co., 20 Wallace, 117.

3. The Act of July 27th, 1866, has been construed to split the suit in two parts, because of a supposed inference by Congress, that under the constitution the whole case could not be removed; and the obvious purpose was to give a removal to a non-resident defendant; (Bixby *vs.* Couse, 8 Blatchford, 73; Allen *vs.* Ryerson, 2 Dillon, 501; Field *vs.* Lownsdale, 1 Deady, 288); and this court in the Sewing Machine cases, (18 Wallace, 583), observed, that considering the stringent conditions of the act, it was doubtful if it was of much practical benefit.

4. The Act of March 2d, 1867, has been interpreted by this court in the Sewing Machine cases, (18 Wallace, 553,) and Vannevar *vs.* Bryant, (21 Wallace, 41,) to have the same meaning as the twelfth section of Act of 1789, that all the parties plaintiffs and defendants must be citizens of different States.

5. The Act of March 3d, 1875, has not received a judicial interpretation by this court in relation to the questions at issue in this case: In the Gold Washing and Water Company *vs.* Keyes, (6 Otto, 199,) this court held, that in "cases arising under the constitution or laws of the United States," it must appear affirmatively that some provision of the constitution or laws necessarily were involved in the case; and there was a decision at the last term, which we

think practically decides the present case in our favor. (See Yulee *vs.* Vose.)

5*a*. The joinder of a defendant not served, and who does not appear a citizen of the same State with the plaintiff, does not defeat the transfer of the cause.

Doremas *vs.* Bennett, 4 McLean, 224.
Dillon's Transfer, 1877, page 16, note.
Exparte Girard, 3 Wallace, jr., 263.

6. There have been various decisions in the Circuit Courts.

Judge Dillon of the Eighth Circuit has made a very full review of these acts and the constructions of them in volume 2, of *Southern Law Review*, 282, and a separate pamphlet of the same. In Osgood *vs.* Chicago, Danville and Vincennes R. R. Co., 6; Bissell C. C. R., 330, it was held by Drummond, Circuit Judge.

3. That since its passage, a defendant, though a citizen of the State, where the suit was brought, might remove the cause to the Circuit Court.

4. The petitioners may have a removal, though their co-defendants do not join in the petition, if the controversy is wholly between them and the plaintiff, and can be fully determined between them; and that such a case arises, where a bill is filed by a bond-holder of a railroad, and the company and trustees under the mortgage petition for a removal. That the existence of judgment creditors and a cross-bill by them does affect the right of removal. (In the case of Turner *vs.* I. B. & W. in Dillon's transcript pamphlet, page 34, note.)

7. Collateral issues connected with *the res* do not destroy the right of removal.

8. The petition and bond may be filed in the State court in vacation; and in that instance the jurisdiction of the State court ceases; it does not remain in the State court for it to act in term time. It is not for the State court to decide whether it is a proper case for removal. Irregularities in the removal do not vitiate it, nor authorize the Circuit Court to remand or dismiss the cause, if it has jurisdiction it should retain it.

In Arapahoe County *vs.* Kansas Pacific Railway, (4 Dillon, 277,) Justice Miller held, that where a suit was brought by a citizen of Colorado against a citizen of Colorado and a citizen of Kansas, that the citizen of Kansas could remove the cause to the Circuit Court, because there was a substantial controversy between the real plaintiffs and defendants, which could be decided wholly between them; the opinion of Justice Miller as well as Drummond, reviews the whole of the statutes, and the prior acts on the same subject.

In Taylor *vs.* Rockefeller, volume 7, No. 18, *Central Law Journal*, page 349, Mr. Justice Strong of the Supreme Court decided,

1. In an application for the removal of a cause from the State to a federal court, the petition and bond must be filed before or at the term at which the cause could first be tried, and before the trial thereof.

2. It is the federal not the State court, that has the power to adjudge whether the cause is a proper one for the removal under the act of Congress.

3. Under the Act of 1875, although some of the formal or nominal plaintiffs and defendants may be citizens of the same State, still if it is shown that it is a controversy wholly between citizens of different States, and can be fully

determined as between them, then it is a cause that can be removed to the federal courts. As the opinion of Mr. Justice Strong argues the main point now under consideration, in a manner more forcible than we can imitate, we quote largely from his reasoning.

"The petitioners are citizens of different States from "those of which the plaintiff are citizens, though some of "the plaintiffs and some of the defendants are citizens of "the same State. It may be admitted, that as the law was "before the enactment of 1875; the petitioners would have "no right to remove the cause to the Circuit Court, and "that court would have no jurisdiction, because each of "the plaintiffs was not capable of sueing each of the de-"fendants in a federal court. So it was ruled in Straw-"bridge *vs.* Curtiss, (3 Cranch, 267); similar rulings have "been made under the acts of 1866 and 1867, cases of the "Sewing Machines, (18 Wallace, 553); Knapp *vs.* R. R., "(20 Wallace, 122); such was the general rule. Even in "Strawbridge *vs.* Curtis, the court declined giving an opin-"ion where several parties represent several distinct in-"terests. The rule has been held, not to apply to formal "parties: Wood *vs.* Davis, (18 Howard, 468.) This court "has gone much further. In Shields *vs.* Barrow, (17 "Howard, 139), speaking of parties to a bill in equity, "they were described as, 1st, formal parties: 2d, proper "parties, sometimes called necessary parties, but if their "interest are separable from those of the parties before the "court, so that the court can do complete justice without "affecting others not before it, not indispensible parties; "and 3d, persons who have such an interest in the contro-"versy that a final decree cannot be made, without either "affecting their interest, or leaving the controversy in such "a condition that its final termination might be wholly in-

"consistent with equity and good conscience. Such are "indispensible parties, and subsequent decisions held, "that it is only where an indispensible party defendant "was a citizen of the same State with the plaintiff, that "the jurisdiction of the federal courts was defeated. Ober "*vs.* Gallagher, (93 U. S., 204.")

Referring to this latter case, we observe, that the court says, (page 205): In Louisville R. R. Co. *vs.* Letson, (2 Howard, 497), it is distinctly stated, that the act of 1839 was passed exclusively with an intent to rid the courts of the decision in Strawbridge *vs.* Curtiss, (3 Cranch, 267), which with the Bank *vs.* Deveaux, (5 Cranch, 84), had never been satisfactory to the bar.

An opinion by the way, which entirely accords with Mr. Justice Bradley's observation in Lockhart *vs.* Horn, (1 Wood, 634), commenting on the twelfth section of the Act of 1789: "Were this an original question I should say, "that the fact of a common citizenship existing between "the complainants and a part only of the defendants, pro- "vided the other defendants were citizens of the proper "State, would not oust the court of its jurisdiction. It "certainly would not under the constitution. The case "would still be a controversy between citizens of different "States."

Let us follow up Mr. Justice Strong's argument:

"But whatever may have been the doctrine held prior "to the Act of March 3d, 1875, that act has introduced "great changes in the law. The first section extends the "jurisdiction nearly if not quite as far as the second sec- "tion of the constitution authorizes, alike in relation to "the subject matter of suits and the citizenship of the par- "ties. It adopts the words of the constitution. The sec-

"ond section relates to the removal of suits from the State "to the Circuit Courts, and it follows the language of the "first section. Hence any cause, which might have been "commenced in the Circuit Court, either because of its sub-"ject matter, or the citizenship of the parties may be re-"moved from a State court into a federal one. It is cer-"tain that the act of 1875 confers a right to remove causes, "which could not have been removed under any former "act. It expressly declares that, when, in any suit men-"tioned in the second section, there shall be a controversy, "which is wholly between citizens of different States, and "which can be determined *as between them*, then either one "or more of the plaintiffs, or defendants actually inter-"ested in the controversy, may remove said suit into the "the Circuit Court. It is not when the controversy or "even the main controversy is between such citi-"zens. The meaning of the clause is not obscure. "In many suits there are numerous subjects of con-"troversy, in some of which one or more of the defend-"ants are actually interested, and other defendants are "not. The right of removal is given where any one of "those controversies is wholly between citizens of different "States and can be determined as between them, though "there may be other defendants actually interested in other "controversies embraced in the suit. The clause, 'a con-"troversy which can be fully determined *as between them*,' "read in connection with the other words '*actually inter-*"*ested* in such controversy' implies, that there may be other "parties to the suit, and even necessary parties, who are "not entitled to remove. Such other parties must be in-"dispensible to a determination of that controversy, which "is wholly between citizens of different States, or their be-"ing parties to the action is no obstacle to a removal of "the case into the Circuit Court. If this is a correct con-

"struction of the act of Congress, the case is free from dif-"ficulty."

The petition of Rockefeller and Flagler for the removal asserts that the controversy is wholly between them and the plantiffs, and that as between them it can be fully determined. The motion to remand traverses no fact set out in the petition. The fifth section of the act provides, that if at any time it shall appear that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court, the cause shall be remanded. Looking at the bill and answer, do they involve such a controversy? We cannot doubt that they do.

Indeed, according to the literal reading of the statute, (a reading quite in harmony with the constitution,) the right of removal and the jurisdiction of this court exists, though the controversy between the plaintiffs and defendants petitioning for removal be not the main controversy in the case. It is enough if there be a controversy between citizens of different States, which can be fully determined *as between them*, though it may not be fully determined as between the plaintiffs and the other defendants. The phrase "as between them" is significant.

See Yulee *vs.* Vose, No. 166, October Term, 1878, decided by this court, at the last term.

6. Let us apply this act and the construction put upon it to the cause before the Court: Case 29 is a bill of foreclosure by Loomis, a bondholder, and Dennison & Meyer, Trustees, of a mortgage against the Davenport & St. Paul Railroad Company the mortgagor, the Delaware Railroad Construction Company, a mechanics' lien claimant on part of the property mortgaged, and the Delaware County

Railroad Company, a successor company to the Delaware Railroad Construction Company.

These latter defendants, after service of subpœnas, came into Court, and petitioned for the delivery of the possession of the property to them, and for lease to Mr. Henry, the Receiver of the Circuit Court. This petition (Record 29, p. 63,) was overruled (Record 29, p. 77,) and leave was given the Delaware Railroad Company to file a cross bill, which was done (Record 29, p. 83); to this there was an answer, and the cause was tried and decree rendered (Record 29, p. 112).

"So much of this cause came on to be heard as relates "to the controversy between the trustees of the mortgage, "set out in the petition and the claim of the Delaware "Railroad Construction Company, and the Delaware Coun- "ty Railroad Company, claiming under a judgment of the "Circuit Court of Delaware County, Iowa, a mechanic's "lien." This voluntary ~~subscription~~ submission by both the defendants to the jurisdiction of the federal court, in a suit by citizens of New York and Ohio, against citizens of Iowa, is conclusive as to the jurisdiction of that court, without a construction of the Act of 1875.

The Case 30, Delaware Railroad Construction Company *vs.* Meyer & Dennison, was originally a petition in the State court, by a corporation alleged to be a citizen of Iowa (Record, p. 1), against the Davenport & St. Paul Railroad Company, alleged to be a citizen of Iowa (Record, p. 2), claiming a mechanics' lien on that part of the defendant's road-bed in Delaware county. The petition was filed on January 15th, 1874. The petition alleged that Lucius Howard, and John Edgar Thompson, and William Dennison had liens on the property, to which the plaintiff's lien was

paramount (Record, p. 13). On January 19th, 1874 (Record, p. 27), this petition was answered. Notice was served on the Davenport & St. Paul Railroad Company only, not on the other parties (Record 29, p. 30).

A decree was rendered against the Davenport & St. Paul Company on the 6th of February, 1874, establishing a mechanics' lien against that company, and continuing the cause as to all the other defendants (Record, pp. 39 and 40).

On the 6th of February, 1874, (Record, p. 40), same day as judgment, an affidavit was filed that John Edgar Thompson and William Dennison, trustees of certain bondholders, were non-residents of Iowa. On the 7th of April, 1874 (Record, p. 41), a supplemental petition was filed, asking that the remaining defendants, not served with process, be foreclosed of all right to redeem said property, and that the plaintiff's lien be declared paramount. Publication of notice to appear on May 18th, 1874 (Record, p. 44).

On February 17th, 1874, execution was issued on the judgement of February 6th, 1874 (Record, p. 45). A general execution was issued against the interest of the Davenport & St. Paul Railroad Company in said property, and a sale was made on April 4th, 1874.

On May 22d, 1874, the record entry, page 49, shows that the case was *dismissed* as to Lucius Howard; decree by default was rendered against Thompson & Dennison, on the property described in the decree of February 6th, and barring and foreclosing all right of redemption in said property, and declaring the plaintiff's the superior lien.

There was no sale nor further action on this decree. On January 26th, 1874 (Record pp. 49 and 50), William Dennison, under the Stututes of Iowa, filed a petition alleging himself to be the surviving trustee; that service was made by

publication, and not personal service; that Thompson was dead; and applying for a new trial, and also filing an answer to the petition, setting up a trust mortgage to him and Thompson, of July 1st, 1871, on all of said railroad and property. On January 26th, 1875 (Record, p. 51), the Court entered a judgment setting forth that Dennison was the surviving trustee, granting him a new trial, ordering his answer to be filed, and continuing the cause to the next term. On the 19th of May, 1875 (Record, pp. 54 and 55), Meyer made himself a party to the suit, claiming to be successor to Thompson, and on the same day Meyer & Dennison filed a petition and bond to remove the cause to the United States Circuit Court, avering that they were citizens of the States of New York and Ohio, and all the other parties were citizens of Iowa; that the amount in controversy exceeded $500. The petition was not sworn to, as it was not required by the Act of 1875. It was at the first term after the passage of the Act of March 3d, 1875, and is in the precise language of that act. This petition was called to the attention of the court on the 21st of May, when the court proceeded with the trial, and overruled by the State court (Record, p. 61), Meyer & Dennison protested against this action of the court (Record, p. 64), and moved the court to proceed no farther with the trial (Record, p. 66). The court overruled the protest had the cause adjudged that the Delaware Railroad Company had a prior lien, and barred the trustees from any right of redemption.

This cause was transferred to the United States Circuit Court. The Delaware County Railroad Company moved to dismiss the cause (Record, p, 110) and to remand it (p. 116), and this motion was overruled (Record, p. 111). The cause was tried on petitions, answer, replication, evidence and stipulations of counsel (Record, p. 119), and

there was a decree for the trustees, annulling the judgments of February 6th, 1874, and May 22d, 1874, and May 21st, 1875. The sale was set aside and cancelled, and declared to be of no validity against the trustees of the mortgage; and appeal taken to this Court.

Case 260, Meyer & Dennison, plaintiffs in error, *vs.* The Delaware Railroad Construction Company, defendants in error, from the Supreme Court of Iowa, is the same as Case 30, up to the end of the trial by the State court, after the transfer on May 20th, 1875. The judgment of May 22d, 1875, after the transfer to the United States Circuit Court, is on page 66. This record the defendant moved to correct on page 69 of the printed record, so as to show that before the cause was called for trial, Meyer asked leave to be made a co-defendant. That as soon as counsel for defendant could be heard, after the refusal to grant Meyer's application, the defendant asked leave to ammend his petition and bond to transfer the cause to the United States Circuit Court, so as to make the petition and bond comply with the ruling of the court. That prior to this time, on the 19th of May, 1875, the said petition for the removal of the cause had been placed on file with the clerk.

The court record, (page 110, 111); and that record so corrected reads, that the court met on May 17th, 1875: That on May 19th, 1875, Dennison filed a further answer on leave; that on May 21st, Meyer called up his motion made May 19th, 1875, to be made a party defendant; and the motion was overruled; that the plaintiff then offered in evidence the contract sued upon, whereupon Dennison asked leave to file on amended petition and bond for the transfer of this cause to the United States Circuit Court. A petition and bond for that purpose having been filed with the Clerk on May 20th, 1875, one of the regular days of the

court, but no notice of the same having been brought to the court; the plaintiff objected to the bond as insufficient, and because the application to transfer was too late, the court sustained the objection to the transfer; on May 22d, Dennison moved the court to proceed no further with the cause, asked leave to file a new bond, or to deposit money with the court. Court overruled the protest, whereupon the trial proceeded, decree rendered. The cause was appealed to the State Supreme Court, which maintained the right of the State court to decide on the transfer of the cause; and affirmed the judgment of the Delaware Circuit Court, (Record 122, 127), and Meyer and Dennison brought a writ of error to this court.

We propose now to add a few questions of jurisdiction. Was this cause transferable under the Act of March 3d, 1875?

The Court will bear in mind, that when the judgment of May 22d, 1875 was rendered against the trustees, Thompson and Dennison, there were but two parties to the record: the plaintiffs, the Delaware Railroad Construction Company, and Thompson and Dennison defendants. The process was never served on Howard, and the suit as to him was dismissed. The Delaware Railroad Construction Company was the plaintiff, and averred that it was a citizen of Iowa; the defendants, Thompson and Dennison were alleged by it to be non-residents of Iowa.

The suit against the Davenport and St. Paul Railroad Company was terminated by the judgment of February 6th, 1874. The supplemental bill was a new suit against the trustees of the mortgage and one Howard, against whom the supplemental bill was dismissed.

Under the last clause of the second section of Act of March 3d, 1875, we think there can be no doubt that this

cause was properly transferred. By that clause, "when in "any suit mentioned in this section there shall be a contro- "versy which is wholly between citizens of different States, "and which can be fully determined as between them, then "either one or more of the plaintiffs or defendants actually "interested in such controversy may remove said suit."

The controversy here was wholly between the Delaware Railroad Construction Company, claiming a mechanics lien, and the trustees claiming a mortgage lien, this controversy was *wholly* between them. The railroad company was not a party to the question of priority as between them, it might deny either lien, it might admit both, but as between the lien claimants for priority or superior right, the contest was wholly between them, and it is difficult to conceive of a more clean cut case, of a controversy wholly between citizens of different States, than the one at bar. The plaintiffs have given us an argument to the man which is irresisted. He has tried his cause in the Circuit Court by itself, independent of even the foreclosure suit; the decree is wholly between the plaintiff and the trustees, and solely affects them and no other parties. He has found that the controversy is "wholly with the trustees," and was fully determined as to them."

Another question has been raised on the sufficiency of the allegations of citizenship; the allegations are (Record 30, page 55,) "The Delaware Railroad Construction Com- "pany is a citizen of Iowa, and Meyer is a citizen of New "York, and Dennison a citizen of Ohio," filed on May 19th, 1875. It is contended that the allegation ought to be, was a citizen at the commencement of the suit, and now is.

Such was the construction put on the twelfth section of Act of 1789, in Pechner case, (95, U. S., 183,) but this court

distinctly stated, that this construction was not intended to apply to the subsequent acts: and in Yulee *vs.* Vose, decided October term, 1878, this court repeated this reservation, and decided that such was not the meaning of the Act of July 27th, 1866.

The words of the twelfth section of Act of 1789, are, "if "a suit be commenced by a citizen of a State in which the "suit is brought against a citizen of another State, may "be removed when defendant applies."

The language of the Act of July 27th, 1866, is, "that if "in any suit already commenced, or that may hereafter be "commenced by a citizen of the State in which the suit is "brought against a citizen of another State, may be re-"moved at any time before trial or final hearing."

The language of the Act March 2d, 1867, is, "that where "a suit is now pending or may hereafter be brought in a "State court where there *is* a controversy between a citizen "of the State in which the suit is brought, and a citizen of "another State, may be removed at any time before final "hearing on trial."

The Act of March 3d, 1875," "That in any suit of a civil "nature in law or equity now pending or hereafter brought "in any State court, in which there shall be a controversy "between citizens of different States, &c., either party may "remove said suit; and when in any such suit there shall "be a controversy which is wholly between citizens of dif-"ferent States, and which can be wholly determined as be-"tween them, &c."

We think this court has properly construed the act of 1866 to mean that the application was sufficient if the parties were citizens of different States, when the application was made.

In Yulee *vs.* Vose, this court said the evident purpose of the act of 1866 was to relieve a person sued with others in the State courts of which he was not a citizen from the disabilities of his co-defendants.

In construing the act of 1867, Mr. Justice Miller in Johnson *vs.* Monell, (1 Woolworth, 390,) held, that a party might by a voluntary removal from the State, change his citizenship and remove a cause for local prejudice. Says the court, (page 397.) "The act does not in terms prescribe "the time at which the citizenship must be acquired. Had "Congress intended to confine the privileges of the act to "parties who were citizens of different States, at the com- "mencement of the suit, it would have been very easy so "to have provided. It did not see fit to do so. On the "other hand, in express terms, or at least in the strongest "implication it is provided otherwise. The language is, "'where a suit is now pending, or may hereafter be brought "in which *there is* a controversy," which is as much as to "say, whenever a controversy shall arise in a suit pending "in the State court, the parties to which, shall be citizens "of different States, the cause may be removed. No time at "which the citizenship shall be acquired is limited."

In McGinnity *vs.* White (3 Dillon, 350), applies the same construction to the Act of 1866, and Dillon adopts the same line of reasoning under the Act of 1789, in his treatise on removals (2 *Southern Law Review*, 313, and pamphlet on same).

The language of the Act of March 3d, 1875, is much broader than any of the previous acts, it says:

"§ 2. That any suit of a civil nature, now pending, or "which may hereafter be brought, in *which there shall be* a "controversy between citizens of different states," the cause

may be removed. The language of none of the other acts is so broad and comprehensive. The Act of 1789 says, "a suit *commenced* against a citizen of another state."

The Act of 1866: "a suit already commenced, or here-"after to be commenced, the defendant, who is a citizen, "may remove.

The Act of 1867: "now pending, or hereafter to be "brought, in which there is a controversy, such citizen of "another state may," etc.

The Act of March 3d, 1875, intended to cover the whole ground of the Constitution, a controversy between citizens of different states wherever such controversy shall arise.

In closing this argument we will allude to some technical objections:

It is said the application is not sworn to. Under the Act of 1875 it need not be, and under the Act of 1867 it need not be, and under the Act of 1867 no such objection was made in the court below.

It is said it is not signed at the bottom, subscribed. It is signed in the body of the instrument. That has been held to be sufficient in Iowa, for more than thirty years, and at common law always. (See Wise *vs.* Ray, 3 George Green's (Iowa) Reports, 430).

It is said one of the sureties was an attorney. The Circuit Court has settled on the sufficiency of the surety, and that question is not one that can be appealed from.

It was objected that the application was not before the trial, or in time, under the Act of 1875. The application was at the first term after the act was passed, and was made before the trial, and the excuse of the State court to proceed with the case was that it was not called to his at-

tention. The case of Yulee *vs.* Vose settles that question without further argument, when the State judge's attention was called to it, it was his duty to proceed no further with the cause.

Finally, there are two considerations which we think conclusive of the jurisdiction of the Circuit Court:

1. In case 29, the trustees and bondholders brought a foreclosure ~~writ~~ suit on the mortgage, and made the Delaware Railroad Construction Company, and the Delaware Railroad Company, defendants, claiming a prior lien over them. To this bill the Construction and Railroad Company appeared, not as defendants, but the Delaware Railroad Company, as assignee of the Construction Company, filed a cross-bill and claimed affirmative relief on their mechanics' lien claim. ~~This~~ they voluntarily submitted to the jurisdiction of the Court, to adjudicate the whole subject of the controversy. They cannot now escape this jurisdiction by a motion to dismiss the State court cause, on the same subject matter, and between the same parties. They have not been compelled to by an adverse decision of the court, but have of their own will invoked the jurisdiction of the federal court.

2. The cases 30 and 260 are State court cases, one transferred to the Circuit Court, and the other action by State courts after transfer of the new trial cases of May 22d, 1875. The Court is fully advised of the two judgments, one of February 6th, against the Davenport & St. Paul Railroad Company, which was executed by a sale of the property on May 4th, and the other judgment of May 22d, 1875, in which the suit as to Howard, who was not a co-claimant with the trustees of the bondholders, was dismissed, and the judgment was wholly between the Construction Com-

pany, plaintiffs, and the trustees of the bondholders, defendants. On this judgment there was a new trial under the State law, and a transfer to the Circuit Court, after the new trial was allowed, at the first term after the Act of 1875 was passed. Certainly the first as well as second clause of the Act of 1875, gave jurisdiction to transfer this cause; there were then no parties to the record, except a citizen plaintiff, and non citizen defendants. The cause was completely within the principle of Yulee *vs.* Vose, decided under the Act of 1866, the words of which ("where "there is a controversy between citizens of different states, "which can be fully decided as to them,") are like the Act of March 5th, 1875.

There were no parties to the suit at the time of the transfer, except citizens of different states.

GRANT & GRANT,

For Trustees, Appellees in 29 and 30,
and Plaintiffs in Error in 260.

Filed.
Oct 29. 1889

No. 209.

Supreme Court of the United States.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY,
Appellants.

vs.

LEWIS H. MEYER and WILLIAM DENNISON, Trustees,
Appellees.

Appeal from the Circuit Court of the United States for the District of Iowa.

Brief on Motion to remand to State Courts the cases of TYSEN *vs.* WABASH RAILWAY COMPANY AND OTHERS, by

CHARLES W. HASSLER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY,
Appellants.

vs.

LEWIS H. MEYER and WILLIAM DENNISON, Trustees,
Appellees.

Appeal from the Circuit Court of the United States for the District of Iowa.

Availing myself of the leave of this Court, by an order entered in the above-entitled cause, to file a brief upon the construction of the Act of March 3, 1875 (18 Stat., 470), attention is respectfully requested to the argument recently made by me upon the hearing of motions to remand to the State Courts the cases of Tysen and others *versus* the Wabash Railway Company and others, purporting to have been removed under that Act, but which motion was denied, although the learnd Circuit Justice stated that, in his opinion, the defendant Trustees were indispensible parties to the maintenance of the action.

The doctrine which appears to me to be clearly sustained by the Constitution and the decisions of this Court is:

Where indispensible parties are on opposite sides of the record, and those parties are citizens of the same State, the United States Courts cannot have jurisdiction of the cause, and that in so far as the Act of 3d March, 1875, appears to permit such jurisdiction, that act is unconstitutional and void.

United States Circuit Courts

FOR THE SOUTHERN DISTRICT OF ILLINOIS, AND DISTRICT OF INDIANA.

DAVID J. TYSEN, JR., and others,

vs.

THE WABASH RAILWAY COMPANY, and others, *Trustees.*

In Equity.

Brief on Motion to Remand.

The facts pertinent to the present motion are as follows:

On the 29th day of April, 1878, in the Circuit Court for Champaign County, Illinois, David J. Tysen, Jr., filed his bill of complaint against the Wabash Railway Company and certain persons designated as trustees, alleging that he held bonds secured by mortgages upon the railway property controlled by the defendant company, and asking for a foreclosure of the mortgages, the removal of certain trustees, for the appointment of a Receiver *pendente lite*, and for an injunction.

The defendants, as trustees, named in the bill, were Alexander M. White, George Griswold, and Henry H. Worden, trustees of a certain first mortgage trust deed, executed upon a portion of the property in Illinois; Solon Humphreys and James R. Jessup, trustees of a certain second mortgage trust deed, executed upon the same portion of the property in Illinois, for the enforcement of which the action is brought; Isaac H. Knox and James R. Jessup, trustees of a certain consolidated mortgage trust deed executed upon all the

property of the company in Illinois, for the enforcement of which the action is brought; Isaac H. Knox, trustee of a certain mortgage, subsequent in date to both of the two last-named; and George I. Seney, trustee of a certain mortgage subsequent in date to all the others named in the bill, and the only one executed by the defendant company.

An order was thereupon made by the Judge of said Court enjoining said company from using its earnings, except to pay the running and operating expenses of said railway, taxes, insurance, renewals, rentals, repairs, and the salaries of all employees, agents, officers and servants, and also interest on the first mortgage bonds; said injunction order to continue in force till the 11th day of May then next succeeding, at which date the motion for a Receiver was set down to be heard.

On the 9th day of May the Wabash Railway Company filed its petition in the said State Court praying for a removal of said cause to the United States Circuit Court for the Southern District of Illinois, and said Company also filed a bond, and an order was thereupon made by said State Court removing said cause as prayed for.

On the 11th day of May, 1878, in the Circuit Court for Fountain County, Indiana, David J. Tysen, Jr., filed a similar bill of complaint.

The defendants, as Trustees, named in the bill were the Farmers' Loan and Trust Company, Trustee of a certain First Mortgage Trust Deed; Edwin D. Morgan, Trustee of a certain Second Mortgage Trust Deed for the enforcement of which the action is brought; Solon Humphreys and James R. Jessup, Trustees of a certain Consolidated Mortgage Trust Deed for the enforcement of which the action is brought; and George I. Seney, Trustee of another certain Mortgage Trust Deed, subsequent in date to the others, and the only one executed by the defendant company, all covering the same property in the State of Indiana.

On the 13th day of May certain other bondholders were, by order, made parties in these proceedings, and on the 15th an order was entered, on petition of the defendant Railway Company, removing the cause to the United States Circuit Court for the District of Indiana.

On the 15th day of July, 1878, amended bills of complaint were, by leave, filed in the two last named Courts. The other proceedings had in these Courts are not pertinent to this motion.

The petition for removal of the cause instituted in the Illinois State Court alleges that the amount in controversy exceeded the sum of five hundred dollars; and, in *hæc verba*, "That the controversy "in said suit is between citizens of different States; "and that the petitioner was, at the commencement of "this suit, and still is, a citizen of the State of "Illinois; and that the complainant herein, David J. "Tysen, Jr., was then, and still is, a citizen of the State "of New York; that the said Alexander M. White, "Solon Humphreys, James R. Jessup and George I, "Seney were then, and still are, citizens of the State of "New York; that said Henry H. Worden was then, and "still is, a citizen and resident of the State of Massa- "chusetts; and that said Isaac H. Knox was then, and "still is, a citizen of the State of Missouri;" and that "in said suit above mentioned there is a controversy "which is wholly between citizens of different States. "and which can be fully determined as between them, "to wit: a controversy between the said petitioner as "mortgage debtor, and the said complainant, David J. "Tysen, Jr., as mortgage creditor; and moreover, that all "the parties named in said suit as co-defendants with "the petitioner are also creditors of petitioner, whose "debts are secured by mortgage upon the same prop- "erty as that upon which is secured the debts owing "by petitioner to complainant, and that said co-defen- "dants are made parties to this suit only in the capacity "of mortgage creditors, as aforesaid; and that in fact "this suit is wholly between your petitioner, as mort- "gage debtor, and its mortgage creditors as such, all "of whom are citizens of different States from your "petitioner."

In the amended bill filed in the Circuit Court for the Southern District of Illinois there are added as defendants, John T. Terry, a citizen of the State of New York, as Trustee named in a certain first mortgage trust deed executed upon a portion of the property in Illinois; James R. Jessup, John N. A. Griswold, and Lucien Tilton, as Trustees named in a certain other first mortgage trust deed executed upon a portion of the property in Illinois, both of which said deeds covered property not embraced in the deed to White, George Griswold and Worden, nor to Humphreys and Jessup, and are prior in time to the liens of the deeds executed upon the same and other property to Knox and Jessup, and to Seney, and are not liens upon the property covered by the deed to Knox.

The petition filed by defendant company in the Indiana State Court asking for a removal of the case, makes allegations similar to that filed in the Illinois Court as to the amount in dispute, repeats in the same words the averments as to the nature of the suit, and the position of the plaintiffs and the defendant trustees, as to their all being creditors of defendant company, and specifies that David J. Tysen, Jr., was then and still is a citizen of the State of New York, and that the said Farmers' Loan and Trust Company, Edwin D. Morgan, James R. Jessup, and George I. Seney, were then and still are citizens of the State of New York, and Isaac H. Knox, was then, and still is, a citizen of the State of Missouri.

The position of the parties to these actions is thus disclosed:

Plaintiffs:

> Citizens of the State of New York, owners of bonds secured by certain mortgage trust deeds, suing on behalf of themselves and of all others in like interest.

Defendants:

A corporation—not the mortgage debtor, but the purchaser of the property at foreclosure sale "subject to the liens of the mortgages"—owner of the equity of redemption, and in possession of the property—a citizen of each of the States of Ohio, Indiana and Illinois.

Trustees—citizens as follows:

(1) Named in mortgages prior in date to those upon which suit is brought:

ILLINOIS.

Griswold, White, Terry, Jessup,—New York. Worden, Griswold,—Massachusetts. Tilton,—Illinois. Knox,—Missouri.

INDIANA.

Farmers' Loan and Trust Company,—New York.

(2) Named in the mortgages given to secure bonds owned by plaintiffs:

ILLINOIS.

Humphreys, Jessup,—New York.
Knox,—Missouri. Jessup,—New York.

INDIANA.

Morgan,—New York.
Knox,—Missouri. Jessup,—New York.

(3) Named in the only mortgage executed by defendant company, and subsequent to all others:

Seney,—New York.

The question now presented is—

"Has this Court jurisdiction of these causes?"

I.

The jurisdiction of the United States Circuit Courts is limited, and depends upon one of two things, either the nature of the subject matter, or the citizenship of the parties. In the cases at bar such jurisdiction can be claimed only because of the latter.

The Constitution has thrown impassable barriers to unlimited jurisdiction of the United States Courts.

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time establish." Art. III., § 1.

"The judicial power shall extend to all cases in law and equity; * * to controversies * * between citizens of different states." Art. III., § 2.

"Congress, it may be conceded, may confer such jurisdiction upon the Circuit Courts as it may see fit, within the scope of the judicial power of the Constitution not vested in the Supreme Court." *Case of the Sewing Machine Companies*, 18 Wall., 553, 577.

"The Circuit Courts shall have original jurisdiction as follows: *First.*—Of all suits of a civil nature at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and an alien is a party, or the suit is between a citizen of the state where it is brought and a citizen of another state. * * " *Revised Statutes*, § 629.

"The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, * * or in which there shall be a controversy between citizens of different states." Act March 3, 1875, § 1.

Mr. Justice Woodbury, in *The United States v. The New Bedford Bridge*, 1 Wood & M., 401, 406, says:

"And if for that, or any other reason, it should appear to this court a question of real doubt whether it

possesses any jurisdiction in such a case over the subject matter, it will be its duty to proceed no further in the trial, because, being a court of limited jurisdiction, it cannot transcend those limits, though the parties make no objection, but is bound itself to pause." Citing *Capron v. Van Noorden*, 2 Cranch, 126, *Rhode Island v. Massachusetts*, 12 Peters, 719, *Kemp v. Kennedy*, Peters C. C., 30, 36.

Further, in the same opinion, Mr. Justice Woodbury says, page 406, "In the courts of the United States jurisdiction must be derived from the constitution itself, or treaties or acts of Congress."

In *Kemp v. Kennedy*, Mr. Justice Washington says, page 36, "Courts of limited jurisdiction must not only act within the scope of their authority, but it must appear upon the face of their proceedings that they did so, and if it does not appear, all that they do is *coram non judice* and void."

To the same effect are:

Elliott v. *Piersol*, 11 Peters, 328, 340.
Williamson v. *Berry*, 8 How., 541.
Wilcox v. *Jackson*, 13 Peters, 499.
Shiver's Lessee v. *Lynn*, 2 How., 59.
Lessee of Hickey v. *Stewart*, 3 How., 750.

Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.

Exparte Bollman, 4 Cranch, 93;
Sheldon v. *Sill*, 8 Howard, 441, 449,

and can have no jurisdiction but such as the statute confers. *Case of Sewing Machine Companies*, 18 Wall, 577.

In *Rhode Island* v. *Massachusetts* (12 Peters, 657), when denying a motion made by Mr. Webster, the Court says:

"Jurisdiction is the power to hear and determine the subject matter in the controversy between the parties to a suit, to adjudicate or exercise any judicial power over them; the question is, whether *on the case*

before the Court, their action is judicial or extra judicial, with or without the authority of law, to render a judgment or decree upon the rights of the *parties litigant*.

"If the law confers the power to render a judgment or decree, then the Court has jurisdiction, what shall be adjudged or decreed between the *parties*, and with which is the right of the case, is judicial action by hearing and determining it.

"But as this Court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the constitution and laws have authorized it to act, any proceeding without the limits prescribed is *coram non judice*, and its action a nullity. And whether the want or excess of power is objected to by a party or is apparent to the Court, it must surcease its action or proceed extra judicially."

"If not warranted by the constitution or the law of the land, our most solemn proceedings can confer no right. * * The line which separates error in judgment from the usurption of power is very definite. * * There can be no middle character assigned to judicial proceedings.

Voorhees v. *Bank of the United States*, 10 Peters, 449, 473.

Jurisdiction must be affirmatively shown.

Gray *v.* Larrimore, 2 Abb., U. S., 542.

The Circuit Court is a Court of limited jurisdiction, and the Supreme Court has said that the fair presumption is (not as with regard to a Court of general jurisdiction that a cause is within its jurisdiction, unless the contrary appear, but rather) that a cause is without its jurisdiction till the contrary appear.

Harrison v. *Hadley*, 2 Dillon, 229, 234.

In *Barney* v. *Baltimore*, (6 Wall., 280, 290,) Mr. Justice Clifford says, "No one will pretend that Congress can extend the jurisdiction of the Federal courts beyond the power conferred in the constitution."

II.

This Court can have jurisdiction of these causes only because of the citizenship of the parties. The petitions for removal from the State Court admits this, and shows it in the words "this suit is wholly between your petitioner as mortgage debtor, and its mortgage creditors as such, all of whom are citizens of different States from your petitioner," the defendant railway company.

Does, then, the jurisdiction of the Court depend upon the citizenship of those who may be beneficially interested in the controversy or upon the citizenship of the parties to the record?

The facts in *Coal Company* v. *Blatchford* (11 Wall. 172), were these: Plaintiffs, Blatchford, a citizen of New York, and Newman, a citizen of Pennsylvania; defendant, a corporation created by and existing under the laws of Pennsylvania. Plaintiffs alleged that "they as trustees sued solely for the use of Henry Beckett, an alien and a subject of the Queen of Great Britain, and Joseph Lloyd, a citizen of New Jersey, both residing in New Jersey." Defendant demurred to the bill on the ground that the plaintiff, Newman, and the defendant corporation, being citizens of the same State, the Court had no jurisdiction of the cause. The Circuit Court for the Western District of Pennsylvania overruled the demurrer, and rendered a decree for the plaintiffs. From the decree the appeal was taken to the Supreme Court, and the question there presented was, whether the jurisdiction of the Circuit Court depended upon the citizenship of the trustees, who were the plaintiffs, or of the parties for whose benefit the suit was averred to have been brought.

The Supreme Court reversed the decree of the Court below, and remanded the cause with directions to dismiss the bill.

"Where the jurisdiction of the Federal Court depends on citizenship, it is the citizenship of the parties to the record that is alone considered, and not of those who, although not parties, may be beneficially interested

in the litigation." Dillon on Removal of Causes, 48, and cases there cited.

In *Coal Company* v. *Blatchford* it was laid down as a universal rule that in controversies between citizens of different States the jurisdiction of the Federal Courts depended not upon the relative situation of the parties concerned in interest, but upon the relative situation of the parties named in the record, and the court say, "The citizenship of the parties is averred in the bill of complaint, and the consequent defect in the jurisdiction of the court is apparent." (p. 178.)

The citizenship of the parties to the record being here shown by the pleadings, the claim that the jurisdiction of this Court attaches because certain defendants are jointly with plaintiffs "mortgage creditors," as such, of defendant company, cannot be sustained.

The plaintiffs do not bring this action against the defendant trustees because of their being jointly with plaintiffs "mortgage creditors as such" of defendant railway company, but because they are the trustees named in the mortgage trust deeds, and a perfect title cannot be obtained by a purchaser at foreclosure sale without their being parties to the suit and bound by its decrees.

But it may be contended that the trustees named in the bill are so far immaterial and unnecessary parties, that their presence cannot affect the question of jurisdiction.

In *Ward* v. *Arrendondo* (1 Paine, 410), Mr. Justice Thompson says, page 412, "But it is said that Thomas is only a nominal party, and that the jurisdiction of this Court cannot be taken away in such case. If the fact be so, that he is a mere nominal party, there is no doubt it would not deprive this Court of jurisdiction. * * * In such cases the jurisdiction of the Court, depending upon the question whether the individual who is *prima facie* incompetent to appear in the Courts of the United States, is a real and substantial, or only a nominal party, this Court must of necessity go so far into the merits of the case as to enable it to decide that question."

After examining the facts of the case, the opinion continues, "But he (Thomas) was an essential party to enable the complainant to obtain the relief sought, viz., a title for the land. * * * In the case of *Wormly* v. *Wormly* (8 Wheat., 451,) the criterion by which it was determined whether a party was nominal or not was whether a decree against him was sought. The Court said it would not suffer its jurisdiction to be ousted by the mere joinder or non joinder of formal parties, but will proceed without them, and decide upon the merits of the case between the parties who have the real interest before it, whenever it can be done without prejudice to the rights of others. Thomas, we think, is not a mere formal party, but that a decree against him is essential to the relief claimed, if the complainant is entitled to it."

In *Richards et al.* vs. *Chesapeake and Ohio Railroad Company et al.* (1 Hughes, 20), dismissed by the U. S. Circuit Court for want of jurisdiction, the facts were as follows:

The Virginia Central Railroad Company executed a mortgage in April, 1850, for $100,000. In June, 1854, the same company executed another mortgage for $1,500,000. In February, 1866, the same company executed a mortgage, third in order of time, for $300,000. A consolidation of several railroad corporations, including the Virginia Central, having been consummated, a (fourth) mortgage was executed by the consolidated company, the Chesapeake and Ohio Railroad Company, in October, 1868, to Duncan, Calhoun, Orton and Maury (now deceased), which mortgage covered all the property embraced in prior mortgages named, and also other property not included in them, and was given to secure certain liabilities in amount unascertained of the Virginia Central Railroad Company. Afterwards, in January, 1870, the consolidated company executed to Duncan and Calhoun, as trustees, a (fifth) mortgage to secure bonds to be issued to the amount of $15,000,000. Subsequently, in October, 1872, another mortgage (sixth) was executed to Calhoun and Kitchen, of all the property covered by the last preceding mortgage,

and specifically embracing also a newly built portion of the line, and certain other property.

The original plaintiffs, bondholders, were citizens of New York. The defendants were the trustees named in the several mortgage deeds. The trustees, Duncan and Calhoun, named in the (fifth) mortgage upon which suit was brought, were also citizens of New York. Orton, a co-mortgagee with Duncan and Calhoun, in the fourth mortgage, was also a citizen of New York. Kitchen, a co-mortgagee with Calhoun in the sixth mortgage, was also a citizen of New York.

Immediately upon filing the bill, the defendants, Duncan and Calhoun, trustees as above described, came into Court, and asked that they might be allowed to become complainants and not defendants, which request, *with the consent* of all parties, was allowed, and thereafter the original plaintiffs did not further appear in the action by their solicitor originally employed, but by counsel retained by the trustees.

Under these circumstances the railroad company moved to dismiss the suit for want of jurisdiction, because Orton, a prior mortgagee, and Kitchen, a subsequent mortgagee, who were parties defendant, were citizens of New York. The Court held, Chief Justice Waite concurring with Judge Bond, that Kitchen, though a proper, was not an indispensable party, and that the Court might proceed without him, and that if the trustees, Duncan and Calhoun, admitted co-complainants with Richards, and now controlling the suit, *thought it best for the interest* of their *cestui que trusts* to *sell their mortgage debt*, then Orton's name might also be stricken out, and Duncan and Calhoun proceed to dispose of their bare interest in the road as mortgagees. But Duncan and Calhoun in their petition, joining with the company in asking a dismissal of the suit, alleged that it would be very unwise to sell their bare mortgage interest in the road, and that in their judgment all the prior as well as subsequent incumbrances should be made parties to the proceedings in order to realize the full value of the mortgaged premises; and they alleged that this could not be done in the United States Circuit

Court, because of the citizenship of Orton and Kitchen.

The Court, thereupon, held that it would not be proper to proceed in the cause without making "some, at least, of the prior and subsequent mortgagees parties," and then proceeds to say that the amount of the actual indebtedness under the fourth (Duncan, Calhoun and Orton) mortgage was not definitely known, and that as complainants could not inform purchasers what was the actual amount of the prior incumbrances, it would not be for their interest to sell without making Orton a party to their bill to foreclose their (fifth) mortgage, and "this cannot be done without making Orton a party to the suit, and the objection to that here is, that he is a citizen of the same State with the complainants." The plea that Duncan and Calhoun were co-trustees with Orton in the fourth mortgage, and therefore the interest of those *cestui que trusts* were protected by their appearance, was disposed of by Duncan and Calhoun objecting to representing both classes of *cestui que trusts*, "because their interests are adverse," and by the Court remarking "it would not be proper for the Court to deprive these mortgagees of their sole, peculiar personal representative."

It was also claimed that Kitchen, co-trustee with Calhoun in the sixth mortgage, was a necessary party, for the reason that while that mortgage is subsequent to that of complainants on a certain part of the property, it was claimed to be a first and only mortgage on another part, which claim was disputed, and it was necessary that the conflicting claims of priority of lien should be settled, and the property be sold as an entirety, neither of which could be done without the presence of Kitchen, who thus became a necessary party. The citizenship of the proper and necessary parties being thus disclosed the suit was dismissed.

The amended bills of complaint filed in these causes, show the fact to be that the consolidated mortgage trust deed was executed 1st of February, 1867; and that on the 10th of August, 1870, the company became the owner of the Decatur & East St. Louis Railroad, subject only to the mortgage to Knox, dated 3d June, 1869.

The mortgage executed by the defendant company to Seney is claimed to be a second mortgage on that property, and to be a first lien on yet other property. This claim is contested by the complainants.

In *Branch Bank* v. *McRae* (19 How. U. S., 376) the trustee was decided to be a necessary party. The facts were as follows: Bracy borrowed of the Bank a certain sum, giving a note signed jointly by himself, Mrs. Matheson, and another. To indemnify Mrs. Matheson, he conveyed certain slaves to Gale, in trust to save her harmless; the debt not being paid, judgment was recovered by the Bank, the Trustee sold some of the slaves and applied their proceeds to reduce the debt. The bill asserted a lien on the remaining slaves by virtue of the trust deed. "But," says Mr. Justice Curtis, delivering the opinion of the Court, "our opinion is, that Gale, the Trustee, and Mrs. Matheson, the *cestui que trust*, are indispensible parties to a bill for the subjection of their property to the claims of the Bank by virtue of the trust deed," and as they had not been made parties, the Court says: "Upon that footing the bill cannot be maintained."

The case of *Gardner* v. *Brown*, (21 Wall. 36,) presents the question as to whether the trustee named in the mortgage trust deed is not so far a necessary party as to oust the jurisdiction of the Circuit Court when the *cestui que trusi*, complainant who filed a bill to foreclose the trust deed, is a citizen of the same state with the Trustee. The case came up before the Supreme Court, on appeal from the Middle District of Tennessee. The Circuit Court had remanded the case to the State Court, because of the citizenship of the parties, as set out in the record, but the Chief Justice, setting aside the plea that the trustee had never given bonds as required by statute, delivering the opinion of the Court, says:

"The Circuit Court was right in its opinion that Walker, (the trustee), was a necessary party to the relief asked against Gardner (the mortgagor), and in refusing to entertain the jurisdiction and in remanding the cause.

The bill prayed a foreclosure of the mortgage and sale of the land. This required the presence of the party holding the legal title. The complainant had only the equitable title. Walker held the legal title; the final determination of the controversy, therefore, required his presence."

If it is said that the removal in that case was attempted under the Act of 1866, and that the removal in the case at bar was under that of 1875, the reply cannot but be that neither of these acts can change the provisions of the constitution regarding the citizenship of the parties; that the fact that "the final determination of the controversy" in the case at bar "requires" the presence of the Trustees is not vitiated by the other fact of an attempted removal of these cases to this court under a misconstruction of the Act of 1875.

Latham v. *Barney* (10 Chicago Legal News, 11,) was recently decided by Judge Nelson, of the District of Minnesota. The plaintiffs were citizens of Massachusetts and of Indiana. All the defendants, except the Winona and St. Peter Land Company, a corporation of Minnesota, being citizens of different states from either of the plaintiffs, joined in the petition for removal, and claimed that the Land Company was not a necessary party; but it was held that the right to removal depends upon the condition of the alleged controversy as it appears at the time of the filing of the complaint, and where the right of removal is to be determined by the fact of one of the defendants being a necessary or unnecessary party the complaint is what is to be looked to, to determine the question, and it is immaterial whether such defendant in its answer accepts or declines the issues tendered.

Walsh v. *Truesdell*, (7 Central Law Journal, 8,) and cases there cited, show that the courts of Illinois deem the trustee an indispensible party in any action to foreclose a mortgage trust deed.

III.

The defendant company, in its petitions for removal filed in these causes, claims that in each of them there is "a controversy between the said petitioner as *mortgage debtor*," and the complainant "as mortgage creditor," and further on in each petition it is alleged "that *in fact* this suit is wholly between your petitioner as mortgage debtor, and its mortgage creditors as such."

That this statement is erroneous and misleading will appear from an examination of the title papers under which the defendant company now claims an interest in the property. The decree rendered in the suit of the Metropolitan National Bank against the Toledo, Wabash and Western Railway, was entered on or about the 14th day of December, 1875, and in the fifteenth section it was especially provided that the various mortgages executed prior to the mortgage then under foreclosure "be and remain, as is hereinbefore provided, liens upon the several sections and subdivisions which have been particularly described hereinbefore, and in the order of priority as to any of them heretofore found and ordered; and that the sale of said road, property, equipment and franchises be made subject to the priority and continuance of said several mortgage liens." In the seventeenth section of the same decree the Master was, upon confirmation of the sale, "authorized and empowered to execute a deed, investing and conveying to said purchaser or purchasers all the property, * * * but subject to the paramount liens and incumbrances thereon," which were thereinbefore described. The deed executed by the Master to the purchasers, Ellis and others, recites that the property was ordered to be sold "subject to the prior liens and liabilities in said decree set forth," and conveys the same in accordance therewith. The deed executed 12th January, 1877, by Ellis and others, transferred to the Wabash Railway Company "all the right, title, interest," they had in and to the property.

Nothing whatever can be found to indicate any

intention either in the decree, or in either of the deeds, that the purchaser at the sale should be bound by any obligation to pay the mortgage debts. The liens of the several mortgage deeds were to continue, but the omission of all words binding the purchasers to pay the principal sums secured by them could not have been unintentional. The Toledo, Wabash and Western Railway Company had, by articles of consolidation or otherwise, expressly agreed to pay the interest and the principal sums as they became due, but no such burden was intended to be assumed by the purchasers or by the new corporation. That the fact was fully understood and acted upon cannot be denied.

The learned counsel who drafted the petition for removal was, then, in error, in speaking of the "petitioner as mortgage debtor," and the statement is misleading. The fact being that the defendant Company repudiates all liability as debtor. "The Wabash Railway Company is not a debtor to complainants or to any of them, but complainants own bonds which are secured by liens upon the property which that company now owns and controls"—is the bold statement of counsel.

Nor is it the intention of complainants to controvert the statement. In recent argument before your Honor, in the case of the *Pittsburgh, Cincinnati and St Louis Railway Company* v. *Columbus, Chicago and Indiana Central Railway Company*, one of the learned counsel, in the course of his argument, cited the case of *Vrooman* v. *Turner*, just reported in 69 New York, 280, and we shall not contend against the cogent reasoning of that case. The defendant, the Wabash Railway Company owes us nothing, but we are simply owners of "bonds which are secured by liens upon the property which that Company now owns and controls." The defendant company "owns" merely the equity in the line of railway which it "controls." It has issued but one series of bonds or notes secured by mortgage, the Seney mortgage, and we own none of them. The mortgagor companies have passed out of existence. If they were in existence they would, we

think, be necessary parties defendant to these suits, but it has been held that even in the case of a purchaser who had assumed the payment of the mortgage debt there is no occasion to make such purchaser a party, if the mortgagee does not care to obtain a personal judgment against him, he being treated as surety only.

In *Childs* vs. *Childs* (10 Ohio St., 339) it was held that the grantee of the mortgagor, holding the right of redemption not made a party to foreclosure proceedings, is not prejudiced thereby, nor is his right of redemption impaired.

In *Girardey* v. *Moore* (5 Central Law Journal, 78) a bill was filed by Mrs. Girardey, in the State Court, alleging that certain property on which Moore held a mortgage was subject to a trust for the benefit of complainant, and charging Isidor P. Giradey, her husband, with receiving the rents and profits, and praying an account of such receipts, and charging Bessman, called the trustee, with breach of trust. All the parties, except Moore, who was a citizen of Pennsylvania, were citizens of the state where the bill was filed. On petition of Moore the suit was transferred to the United States Court, and on motion to remand, it was *held* that the cause was properly transferred.

The record does not show that the mortgage deed in this case was made to Bessman, as trustee, and that Moore was a *cestui que trust* thereunder, but, on the contrary, Bessman is called "trustee," because the property upon which Moore held the mortgage was property which had been purchased by the defendant Isidor P. Girardey, with the proceeds of other property which he had conveyed to the defendant, Bessman, in trust for the benefit of Mrs. Girardey and her children. Bessman was also the agent of Moore, and it was claimed that Moore was therefore cognizant of the trust and bound by it. Isidor P. Girardey held the equity of redemption, was in possession, and receiving the rents and profits, while Bessman stood by consenting thereto, even though Moore had so far proceeded in the foreclosure of his mortgage as to obtain a *fi. fa.*, the writ issued, and the property advertised for sale. "The

bill," says Mr. Justice Bradley, "would have lain against him (Moore) alone, to enjoin him from selling the property, and to establish the trust as against his mortgage. The other defendants would have been *proper* parties, but I think they would *not* have been *necessary* parties to the case. If this view is correct, this controversy between him and the complainants may be determined without the presence of the other defendants as parties in the cause." (The italics are our own.)

The fact then, in that case, that the owner of the equity of redemption in possession and receiving the rents and profits, was a citizen of the same state with the plaintiff, did not prevent transfer of the cause, because he was merely a *proper* and not a necessary party, and yet in the case at bar it will be contended that the owner of the equity of redemption is an absolutely indispensable party, and the trustee, owner of the legal title to the estate, is a mere nominal and unnecessary party, and the defendants may go even so far as to claim that this Court may proceed and determine these causes without his presence.

In *Donohoe* v. *Mariposa Land and Mining Company*, recently decided in the Ninth Circuit, (6 Central Law Journal, 457,) an attempt was made to transfer the suit, because a subsequent incumbrancer made defendant, was a citizen of a different state from the plaintiff, prior mortgagees, and the plea was made that there could be a final determination of the controversy between the two mortgagees without the presence of the mortgagor! In the cases at bar the defendant company claims that it is not a "debtor to complainants or any of them," and yet claims that because of its being the owner of the equity of redemption it is the most essential, important, necessary, and indispensable party defendant, and that the others are merely nominal parties!

IV.

The Act of March 3d, 1875, under which the defendant company cannot but claim that its petition was made and bond filed, provides very fully for the removal of causes from State to the Federal Courts. It says:

"§ 2.—That any suit of a civil nature at law or in equity, now pending or hereafter brought in any State Court where the matter in dispute, &c., * * * or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, * * * and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the Circuit Court of the United States for the proper district."

In *Girardey* v. *Moore*, the question arose as to whether the Act of 1875 repealed the Act of 1866. "The act of 1866," says Mr. Justice Bradley "authorizes a defendant not being a citizen of Georgia, to remove the case as to him if there can be a final determination of the controversy, so far as he is concerned, without the presence of the other defendants as parties in the cause. * * I conclude, therefore, that the act of 1866, so far as it authorizes a defendant to remove a cause as to him, is not repealed by the Act of 1875. And I see no reason why the controversy between the complainants and Moore cannot be finally terminated without the presence of the other defendants." It is not contended, we believe, that these removals are asked for under the Act of 1866, and surely it will not be seriously contended that had the owner of the equity of redemption alone been made party defendant, these controversies could be "finally terminated without the presence of the other defendants." Had the bill been so drawn, a demurrer for want of parties would undoubtedly have been sustained.

Mr. Justice Bradley, in *Vose* v. *Reed* (1 Woods 647, 650), says: "When it properly appears *by the record* that there is a party over whom the Court has jurisdiction, *and who is not an essential party to the proceedings*, the bill will be dismissed as to that party, and retained as to the others," but surely no plea can be made that the defendants, in the cases at bar, trustees holding the legal titles to the estates affected are so far immaterial or non-essential parties to these proceedings that the bills should be dismissed as to them.

Mr. Justice Bradley, in *Girardey* v. *Moore*, speaking of removals under the Act of 1875, says: "In either case it is the suit that is removed, and not a part of the suit," and in *Caraher* v. *Brenan*, (9 Chicago Legal News, 363) the learned District Judge, sitting in this city, has given so thorough an examination of the subject that we do not suppose any effort will be made to retain in this court these causes, so far as they relate to the defendant company, the owner of the equity of redemption, while so far as they relate to the foreclosure of the legal title of the trustees they may be allowed to proceed in the state courts.

Says Judge Blodgett: "It was held by the court in *Chicago* v. *Gage et al.* (6 Bissell, 467,) and has also been held in *Stapleton* v. *Reynolds*, (9 Chicago Legal News, 33,) by Judge Swing, of the Southern Ohio District, that the whole suit must be removed; that a fragment of a suit cannot come to this court for trial, because a party interested in that part, or some single issue, is a citizen of another state from that of the plaintiff. And it seems to me the suit must be wholly between citizens of different states in order to give the right of removal. It is not enough that citizens of different states must be interested in the same issue, or question or controversy which arises in the course of the case; but they must have *such an interest* that when the question to which they are parties is settled, the *suit is thereby determined*, or the right of removal is *not given*. * * * The scope and purpose of the Act of Congress, it seems to me, must be to allow simply a removal to the Federal Courts when the controversy was so

completely a controversy between residents or citizens of different states that the determination of that controversy settled the whole suit."

In *Peterson v. Chapman*, (13 Blatch, 395, 398,) the late learned Circuit Judge, of the Second Circuit, after citing leading cases from both Circuit and Supreme Court reports, says:

"The principle running through all the cases which have been referred to is, that the requisite jurisdictional citizenship must exist as to each individual, plaintiff or defendant, and that what would be necessary if there were but one individual on each side remains necessary as to each individual when there are more than one. This construction does not appear to rest so much upon the particular words employed in the several statutes, as upon the particular words employed in the several statutes or upon the acceptance of the general idea that, when jurisdiction depends alone upon citizenship, the fact that it exists as to one person does not in the least afford a foundation for asserting it over another. The fact of citizenship is entirely personal, and so is the grant of jurisdiction founded upon the fact. This view appears to me to be disclosed in and to have been acted upon in all the cases from *Strawbridge v. Curtis* (3 Cranch, 267), the earliest, down to *Case of the Sewing Machine Companies*, (18 Wall, 583.)"

In his opinion recently filed in the Circuit Court for the Eastern District of Michigan, in *Re Fraser*, (7 Central Law Journal, 227,) Mr. Justice Swayne has recently considered this question of removal. He says:

"For the purposes of this case it may be conceded that the 12th Section of the Act of 1789, and the Acts of 1866 and 1867, re-enacted in the U. S. Rev. Stat. § 639, clauses 1, 2, 3, are not repealed by the Act of 1875. (a.) The case was not removable under the section first named, because it was always held under that provision that all the plaintiffs must be citizens of the state where the suit is brought, and all the defendants citizens of other states. Dillon on Removal, pp. 17, 18. (b.) Nor under the Act of 1866, because it is not a suit brought 'for the purpose of restraining or enjoin-

ing' the contestants, (defendants in the cases at bar.) Nor can there be a 'final determination of the controversy so far as concerns' them, 'without the presence of other defendants in the cause.' *Shields* v. *Barrows*, 17 How., 130. (c.) Nor under the Act of 1867, commonly known as the 'Prejudice and Local Influence Act,' because the removal was not applied for upon either of those grounds, and neither was alleged by the petitioners. (d.) The Act of 1875. This Act contains two clauses proper to be considered. It declares (1) that 'any suit * * in which there shall be a controversy between citizens of different states,' etc., 'either party may remove said suit into the Circuit Court of the United States.' Further: (2) 'And when in any suit,' etc., 'there shall be a controversy which is wholly between citizens of different states, and which can be fully decided as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit to the Circuit Court of the United States,' etc. Viewing the first of these extracts in the light of the past adjudications, and in the absence of any expression from the Supreme Court, I feel constrained (whatever might be my judgment under other circumstances,) to hold that the term 'party' is collective, and means all the plaintiffs and all the defendants, and that all on each side must be 'citizens of different states' from those on the other side."

We beg leave to submit that though this is not a decision of the Supreme Court, yet the fact of its expressing the views of the learned jurist, presiding as Circuit Justice in the Sixth Circuit, in which a part of this railway is situated, is persuasive of the correct construction we seek of the Act of 1875, and the fact that the matter came to his notice in a case involving questions of probate, cannot invalidate the views he expresses as to the law, For "whatever might be" your Honor's "judgment under the circumstances," that this railway, situated in three states, might be better managed if foreclosure proceedings were had in the Federal Courts, yet if this court has not jurisdiction of these causes—as we claim it has not—the question of expe-

diency cannot weigh. But, surely no danger from the State Courts can be apprehended, for is it not a fact that the "Gold Bond" foreclosure took place under the orders of courts in three different states, and the defendant company to-day holds title by virtue of the concurrent decrees of those tribunals.

In *Taylor* v. *Rockafeller*, (6 The Reporter, 226,) Mr. Justice Strong has also recently considered the question, and refused to remand a certain case because, as he said, "There are no other indispensible defendants," than those who were citizens of different states from the plaintiffs. "The real controversy," says Mr. Justice Strong, "as appears from the bill, is between the second and third parties."—The "real controversy" in the causes at bar is the foreclosure of the mortgages, and to this "real controversy" the trustees are indispensible parties. "Any rights," to quote again from Mr. Justice Strong, "to the profits or proceeds of sale not belonging to the second and third parties, the plaintiffs and the petitioners, are only incidental. In these causes the right of redemption by the Wabash Railway Company is not involved in this suit. "Any rights" they may have in that respect cannot be prejudicated.

But it may be claimed that the cases at bar have been properly removed to this court, and that it has jurisdiction because there is "*in this suit* * * *a controversy* which is wholly between citizens of different states, and which can be fully determined as between them by this court;" and the words "suit in which there is a controversy" being used both in the Act of 1867, and in that of 1875, an effort may now be made to give such interpretation to the words "suit" and "controversy" as might, at first sight, aid the defendants on this motion.

Controversy, as defined by Webster, is "a suit in law; a case in which opposing parties contend for their respective claims before a tribunal."

Surely it will not be contended that the framers of the Constitution did not know that the manner in which the controversies between individuals could be adjudi-

cated by the courts was only by a suit or case properly instituted and prosecuted, but as if explaining that they considered the words "case" and "controversy" to be synonymous as applicable to judicial proceedings, the former word alone is used in the second sentence of the second paragraph of this same section, "In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction" — and these "other *cases*" are "*controversies* * * between citizens of different states," as is fully shown by the first paragraph. The constitution thus is its own interpreter.

Judge Johnson in *Peterson* v. *Chapman*, says: "The phrase of the Judicial Act, 'a suit commenced by a citizen of a state in which the suit is brought, against a citizen of another state,' and that of the Act of 1867, 'a suit in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state,' have been held alike to require the jurisdictional citizenship in each individual. In the last phrase, if we say a 'controversy between a citizen of one state and a citizen of another state,' we drop out the requirement of citizenship in the state where the suit is brought, but make no other change, and certainly none in the necessity of the construction so long established, as to the requisite citizenship of each individual. On that point there is no room for discrimination. The present Act embodies precisely this idea, neither more or less, conveying it in fewer words — 'a controversy between citizens of different states.' Where there is such a controversy, either party may remove it. Either party to the controversy includes each individual on the one or the other side; and on the principles of the adjudged cases, the jurisdictional requirement must exist between the plaintiffs on the one hand, and the defendants, on the other. Diversity of citizenship, as to those between whom the controversy exists, is alone regarded."

In the *Case of the Sewing Machine Companies*, (18 Wall, 553, 582,) the Supreme Court consider the wording of the Act of 1867, which employs the words, "a suit * * in which there is a controversy" — as com-

pared with those used in the Judiciary Act, and say: "Different words are certainly employed in the two provisions, but it is difficult to see in what particular the jurisdictionof the State Court is lessened by the last Act, or in what respect the difference of phraseology supports the theory of the defendants as 'a suit by a plaintiff against a defendant' must mean substantially the same thing in the practical sense as 'a suit in which there is a controversy between the parties' as each provision includes the word suit, which applies to any proceeding in a court of justice in which the plaintiff pursues his remedy to recover a right or claim."

The claim that these cases are properly removed to this court because there is some subtle distinction between the words "suit," "case" and "controversy," receives support neither from the constitution nor from the adjudged cases.

We respectfully submit that this Court has not jurisdiction of these causes, and that the motions to remand to the State Courts must prevail.

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Of Counsel.

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1879.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY, AND DELAWARE COUNTY RAILROAD COMPANY,
Appellants,
vs.
LEWIS H. MEYER AND WILLIAM DENNISON,
Appellees.

209 of Oct. Term, 1878.
29 of Oct. Term, 1879.

Appeal from the Circuit Court for the District of Iowa.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY,
Appellants,
vs.
LEWIS H. MEYER AND WILLIAM DENNISON,
Appellees.

210 of Oct. Term, 1878.
30 of Oct. Term, 1879.

From the same Circuit.

MEYER AND DENNISON, TRUSTEES,
Plaintiffs in Error.
vs.
THE DELAWARE RAILROAD CONSTRUCTION COMPANY,
Defendant in Error.

500 of Oct. Term, 1878.
260 of Oct. Term, 1879.

Error to the Supreme Court of Iowa.

Brief on behalf of Meyer and Dennison, Trustees, Appellees in Nos. 29 and 30, and Plaintiffs in Error in No. 260.

CHARLES F. SOUTHMAYD and JOSEPH H. CHOATE,
Of Counsel for MEYER AND DENNISON.

Supreme Court of the United States,

OCTOBER TERM, 1879.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY, AND DELAWARE COUNTY RAILROAD COMPANY,
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Appellant,
vs.
LEWIS H. MEYER AND WILLIAM DENNISON,
Appellees.

210 *of Oct. Term*, 1878.
30 *of Oct. Term*, 1879.

From the same Circuit.

MEYER AND DENNISON, TRUSTEES, *Plaintiffs in Error,* *vs.* THE DELAWARE RAILROAD CONSTRUCTION COMPANY, *Defendant in Error.*	500 *of Oct. Term*, 1878. 260 *of Oct. Term*, 1879.

Error to the Supreme Court of Iowa.

Brief on behalf of Meyer and Dennison, Trustees, Appellees in Nos. 29 and 30 and Plaintiffs in Error in No. 260.

Statement of Facts.

Suit No. 260 was originally brought as a petition in equity in the State Court of Iowa by the Delaware Railroad Construction Company to foreclose an alleged mechanics lien upon the Davenport and St. Paul Railroad Company. (*The references herein are to the record in No.* 260, *unless otherwise specified.*)

It was alleged in said petition that Lucius Howard, the Davenport Railway Construction Company (a corporation organized under the laws of the State of Iowa), and John Edgar Thompson, and William Dennison, Trustees for certain bondholders of said Davenport and St. Paul Railroad had liens upon the property of said road, but that the lien of the Delaware Railroad Construction Company was paramount to all such liens and said Howard, the said Davenport Railway Construction Company and the said Thompson and Dennison, Trustees, were made co-defendants (p. 2 and 13).

The suit was begun on the 15th day of January, 1874, service was made upon the Davenport and St. Paul Railroad Company, but not upon the other defendants (See Sheriff's Certificate, p. 30).

Afterwards on the 6th day of February 1874, a decree was entered in which judgment was rendered against said railroad company in favor of the plaintiff for $51,930.54 and costs of suit and the mechanics lien claimed in the original suit was

established, and the cause was "continued as to all the defendants except said Davenport and St. Paul Railroad Company" (p. 41).

But on the same day there was filed in the clerk's office an affidavit of John M. Britton, the attorney for the plaintiff "that personal service of original notice in said suit cannot be "made upon the defendants John Edgar Thompson, and Wil- "liam Dennison, Trustees of certain bondholders of said rail- "road within the State of Iowa, and they are non-residents of "said State of Iowa" (p. 41).

The next day, April 7th, a supplemental petition was filed by the plaintiff setting out the judgment obtained against the railroad company and asking that the "remaining defendants be "foreclosed of all rights of redemption of the property described "in said original petition; that the said lien be established "against the remaining defendants in said suit, that it be de- "clared paramount of all claims of said defendants, &c." (see p. 42).

Publication was thereupon made of notice to the defendants calling their attention to this amended petition and that unless they appeared at the May Term (May 18), and made answer thereto, default would be entered (p. 44).

Personal service of this notice was made upon the defendants the Davenport Railway Construction Company (p. 48).

On May 4th, the section of the road covered by the line was sold by the Sheriff and bought in for the plaintiff (p. 47).

On May 22d, the case was dismissed as to Lucius Howard, and judgment by default was entered against the defendants, the Davenport Railway Construction Company, who had been actually served with notice, and against John Edgar Thompson and William Dennison (p. 49).

On January 26, 1875, a motion for a new trial in behalf of William Dennison was filed, in which it was alleged that Thompson had died on May 23d, and that neither he nor Dennison had been personally served with process, but that the only mode in which they were brought into court was by publication in a newspaper (p. 50).

And on the same day a bond for security and costs was filed and an answer in behalf of Dennison. Thereupon on the same day, it was ordered by the court "that a new trial in this cause be granted to the said surviving Trustee, William Den-

nison, that the answer offered by the said defendant be filed and that this cause stand continued to the next term of this court" (p. 52).

On the 2d of February, a motion was made to strike out the answer of Dennison because not verified (p. 52).

On the 17th May, the answer was ordered to be stricken out (p. 53).

On the 19th May, leave was given to file an amended answer (p. 53).

On the same day the former answer was filed and verified by Mr. Fisher who was acting as the attorney for Mr. Dennison (p. 54).

On the same day there was filed a petition of Lewis H. Meyer, alleging that he had been appointed Trustee under the mortgage in place of Thompson deceased, and praying to be made a co-defendant with Dennison (p. 55).

On the same day there "was filed with the clerk of said court" a paper in the words following (p. 56).

"Petition to transfer case U. S. Circuit Court.

"IN THE CIRCUIT COURT OF DELAWARE COUNTY,
"IOWA.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY

vs.

LEWIS H. MEYER AND WILLIAM DENNISON, TRUSTEES.

"Now comes your petitioners, Lewis H. Meyer and William "Dennison, Trustees, and state:

"That the Delaware Railroad Construction Company and "all persons who have come in as interveners in the above en- "titled cause are citizens of the State of Iowa; that Lewis H. "Meyer is a citizen of the State of New York, and William "Dennison a citizen of the State of Ohio.

"That they have reason to believe and do believe that from "predjudice or local influence they will not be able to secnre "justice by reason of such prejudice or local influence.

"That said cause can be fully and finally determined in the "United States Circuit Court for the District of Iowa.

"That the amount in controversy in said cause amounts to "more than the sum of five hundred dollars, exclusive of costs, "and they make and file in this Circuit Court, a bond with good "and sufficient security for their entering in such Circuit Court, "on the first day of its next session, a copy of the records in "said suit and for paying all costs that may be awarded by said "Circuit Court if said court shall hold that said suit shall be "wrongfully or improperly transferred thereto, and also for the "appearing and entering special bail in such suit, if such "special bail was originally requisite therein, and they pray of "said court to accept said petition and bond, and ordered the "transfer of the said cause to the said Circuit Court of the "United States.

"Filed, May 19, 1875.

"J. B. SATTERLEE,
"*Clerk.*"

On the next day, May 20th, there "was filed in the office of the clerk of said court," a paper in the words following (p. 56):

"In the Circuit Court of Delaware County, Iowa. Know "all men by these presents, that we, Lewis H. Meyer and "William Dennison, principals, and John E. Henry and "Charles Whittaker, as sureties, are held and firmly bound "unto the Delaware Railroad Construction Company, and all "other persons whom it may concern, in the penal sum of one "thousand dollars, to which payment we bind ourselves, and "each of us, by these presents.

"Given under our hands, this 15th day of May, 1875.

"The condition of this obligation are these:

"The said Lewis H. Meyer and William Dennison have ap- "plied to the Circuit Court of said county, to remove a "certain cause pending in said court, wherein the Delaware "Railroad Construction Company are plaintiffs, and said "Lewis H. Meyer Trustee, successor to John Edgar Thomp- "son and William Dennison, Trustees, and many others, are "defendants, from the said Circuit Court to the Circuit Court "of the United States, for the District of Iowa.

"Now, if said Meyer and Dennison shall enter in the said "Circuit Court of the United States for the District of Iowa, "on the first day of next term thereof, a copy of the record "of said suit, shall pay all the costs that may accrue or "be awarded by said Circuit Court, if it shall hold that said "suit was wrongfully or improperly removed thereto, and shall "also appear and enter a special bail in said Circuit Court in

" said suit, if special bail was originally required therein, then " this obligation shall be void, otherwise in full force.

" WILLIAM DENNISON and
" L. H. MEYER,
" *Trustees.*
" By GRANT & SMITH,
" *Their Attorneys.*

" C. WHITAKER,
" JOHN E. HENRY,
" *Sureties.*

" Surety approved with this bond, this day of May, A. D. " 1875.

" *Judge of the Delaware Circuit Court.*

" I hereby certify, that I am a resident and citizen of the " State of Iowa; that I am worth double the amount herein " intended to be secured beyond the amount of my debts, and " have property liable to execution equal to the sum herein " secured.

" C. WHITAKER.

" Subscribed by and sworn to " by said C. Whitaker, be- " fore me, this, 15th day of " May, A. D. 1875,

" N. M. KACISER,
" *Notary Public,*
" Scott County,
" Iowa.

" Filed May 20th, 1875.
" J. B. SATTERLEE,
" *Clerk.*"

On the same day there was " filed in the office of the clerk of said court " a motion for continuance in behalf of Dennison and an affidavit of Mr. Fisher, the attorney, setting forth, among other things, that the said Dennison resided in the City of Washington, and could not be communicated with by mail in less than one week (p. 57).

On the same day the amended answer was stricken from the files (p. 59).

On the same day a motion for continuance was overruled (p. 59).

On the same day an amended answer was filed apparently without authority (p. 59).

On May 21, an affidavit was filed by Fisher, attorney, to the effect that Meyer had been appointed Trustee, instead of

Thompson, deceased, and that the facts stated in Meyer's petition to be made a co-defendant were true (p. 61).

On the same day objections to the transfer to the United States Court were filed by the attorney for the plaintiff (p. 61).

What took place on May 21st and 22d is recited in the amended decree (p. 110), and it also appears to some extent from the record (pages 62–67), and also from the petition of William Dennison for a correction of the record (p. 68).

We quote the following as the statement from the amended decree (p. 111):

" And now further, on the 21st day of May, 1875, this cause " coming on for further hearing, comes Lewis H. Meyer for " Grant & Smith and L. M. Fisher, and asks to be made a " party defendant in this cause, and calls up his motion by " that purpose, filed in this cause, on the 19th day of May, " 1875, whereupon plaintiff by its attorney, objects to said " Meyer being made a party defendant in this cause, for the " reason that no evidence of the appointment of said Meyer as " Trustee is before this court, and said motion and the objec- " tions thereto having been duly considered by the court, it is " ordered, that the application of said Meyer be made a party " defendant, be refused, and the objections thereto be, " and they are sustained, to which ruling of the court, said " Meyer, by his counsel, excepts and asks that his exceptions " in this behalf be made a matter of record in this cause, " which is accordingly done. Plaintiff now offers in evidence " the contract sued on in this cause, whereupon the defend- " ant, William Dennison, Trustee, asks leave to file an amended " petition and bond for the transfer of this cause to the " United States Circuit Court, a petition and bond for that " purpose appearing to have been filed with the clerk of this " court on the 20th day of May, 1875, one of the regular days " of the present term of the court, to wit, on the 20th day of " May, 1875, aforesaid; but no notice of the filing of the same " having been brought to the court, plaintiff, by its attorney, " objects that the bond is insufficient, one surety being an at- " torney and not eligible as a surety on a bond in court under " the law; and further, that the application to transfer this " cause is too late, the cause being now reached for trial, and " the trial of the same commenced; whereupon the court sus- " tained the objections of plaintiff in this behalf, to which " ruling of the court, the defendant, William Dennison, Trus- " tee, by his counsel, excepts and asks that his exception be " made a matter of record, which is accordingly done, when, " pending further proceedings in said cause, court adjourns to " May 22, 1875.

"And now, on this 22d day of May, 1875, it being one of the "days of the regular May Term, 1875, of said court, the court "proceeds with the further hearing of said cause; whereupon "defendant William Dennison, Trustee, now moves the court "to proceed no further with the trial of said cause, and asks "that said defendant be allowed to file a new bond for the "transfer of said cause to the United States Circuit Court, or "to deposit money for the costs of the same. Plaintiff ob-"jects, on the ground that the cause is now on trial on its "merits; objection sustained, and said defendant, by his "counsel, excepts, and asks that this, his exception, be made a "matter of record, which is accordingly done; whereupon "plaintiff, by its counsel, asks leave to file reply, to the filing "of which defendant Dennison, by his counsel, objects; ob-"jection overruled; and defendant Dennison, by his counsel, "excepts, and asks that this, his exception, be made a matter "of record, which is accordingly done; whereupon plaintiff "files reply, and thereupon defendant Dennison, by his "counsel, asks leave and files his amended answer, and the "court now proceeds with the trial of said cause, on the issues "joined therein, and after full hearing and argument of "counsel, the same is duly submitted to the court, and by con-"sent of parties, the court takes the same under advisement, "with the understanding that judgment shall be rendered by "the court in vacation, and entered as of the last day of this "term. And the court finds the issues in favor of plaintiff, and "files and renders his decision that plaintiff's lien is paramount "to that of defendant, and orders judgment in favor of said "plaintiff (p. 111).

On the 9th of October, 1875, Dennison and Meyer, by their attorneys, filed in the Clerk's Office of the Circuit Court of the United States, for the District of Iowa, a transcript of the Record for the State Court of Iowa in the case already referred to (see Record in No. 3); and in that court a motion to dismiss, and also a motion to remove the cause to the State Court was made—but they were each denied—and then upon the record of the State Court and upon stipulation as to certain facts the cause was tried and the judgment of the State Court adjudging and establishing a prior lien against said Trustees was set aside, annulled and declared for naught, and the mortgage under which said Dennison and Meyer were Trustees was adjudged and declared to be a prior lien on said property.

The State Court maintained its jurisdiction and proceeded in the case, and the record of its proceedings and the appeal therefrom is found in the record of the case No. 260.

The Federal Court maintain its jurisdiction under the removal proceedings, and the record of its proceedings and the appeal therefrom is found in the Record in No. 30.

Question of Removal.

The question of removal is presented in a different aspect in each of the above cases.

The rights and duties of the State Court and of the Federal Court upon the same petition and bond were different.

So far as the State Court acted in the matter, it is to be considered that the reasons for its action must be found in the objections to the removal as filed by the plaintiffs' attorney (p. 62), and as stated in the findings of the court (p. 111). And if the action of the State Court cannot be sustained on the grounds therein stated, then it cannot be sustained at all, for this court will not sustain on appeal the action of a State Court in removal cases upon grounds which were not presented to the State Court or on which the State Court did not pass; for such grounds would be in this court considered to have been waived in the State Court (French *vs.* Hay, 22 Wall., 238).

On the other hand, when it becomes necessary in this court to consider whether the action of the Federal Court herein in refusing to dismiss or to remand can be sustained, then this court must consider the reasons for dismissing the cause or the grounds for remanding the same to the State Court, as those reasons were presented by the plaintiffs' attorney on the motions respectively to dismiss and remand; and perhaps also it is necessary to consider any other grounds for dismissal or remanding that might have been presented by him.

It is important for the appellants in case No. 260, and it is their right, as we understand it, to have a reversal of the action of the State Court therein, even if in case No. 30 there should also be a reversal of the action of the Federal Court herein. And so although we have every confidence both that the action of the Federal Court will be sustained and that the action of the State Court will not be sustained, yet in the argument that follows, the question of removal will be discussed in its fulness as it could have been discussed in the Federal Court; while at the same time in the discussion attention will be called to those

points that were raised or decided in the State Court in case No. 30, in which case it is confidently submitted to this court that the only question now before this court is whether the reasons given by the State Court for its action were sufficient and proper.

It is believed that these are the first cases of importance that have reached the Supreme Court under the removal Act of March 3d, 1875. So that the authorities as to the construction of that act must be found in the opinions of the Justices of the Supreme Court while holding court in the different circuits, and in the opinions of Judges of the Circuit Court.

In one of the recent cases before this court, Vose *vs.* Yulee, the Chief Justice in speaking of a removal attempted under the Act of 1866, says: "The State Court was not bound to surruender its jurisdiction until a case had been made which upon its face gave Yulee a right to the transfer."

In the same opinion are these words: "As no objection was made specifically to the bond which was offered, we are to presume that the security was satisfactory, and that the court refused to withhold further proceedings because a case for removal had not been made."

Under the Act of 1866, then the State Court had a right to pass both upon the sufficiency of the petition and of the bond.

Now under the Act of 1875 it has been held that the State Court has no right to pass upon the sufficiency of either.

Note particularly the opinion of Judges Drummond and Blodgett in the case of Osgood *vs.* The Chicago, Danville & Vincennes R. R., 6 Bissell, p. 330, in which the court after a first argument and a reargument held that the petition and bond might be filed in vacation time, and the cause removed to the Federal Court without any act whatever thereto or knowledge thereof on the part of the State Judge; and in that case it was distinctly held that the State Judge could not pass upon the sufficiency of the bond. (See particularly the opinion, p. 334, 340 and 343.

So Judge Blatchford held that it belonged exclusively to the Federal Court to determine whether the required bond had been filed.

Torrey *vs.* The Grant Locomotive Works, 14 Blatch., 269 (see p. 271).

Certain it is that under former acts great difficulty had been experienced because the State Court had improperly exercised the right to determine upon the sufficiency of the petition and bond, and it would seem as if Congress had in the Act of 1875 expressly taken away the right of that court to pass upon the sufficiency of either. This right of determining upon the sufficiency of the petition and bond cannot well be left in the two courts, for then we should often have as we have in this case—the same case coming to this court from the State Court and the Federal Court, and thus frequently instead of one case removed we should have a duplication of cases.

In this case the State Court claimed the right to pass on the sufficiency of petition and bond, not in any preliminary way, but to the full extent to which the Federal Court itself could do.

These are the words of Chief Justice Stevens of the Iowa Court in his opinion sustaining the court below:

"If the power exists in the State Court to determine the "question of citizenship, or the sufficiency of the petition or "bond in any case, it follows that it may do so in all cases, "because the question is one of power or right, and not as to "the extent of such power or right."

See Rec. 260, p. 123.

Now, when the Act of 1875 declares that "it shall be the duty of the State Court to accept said petition and bond and to proceed no further in the suit," it certainly did not mean that the State Court could determine for itself the sufficiency of the petition and bond, and thereafter proceed in the suit, as it thought best.

The duties of the Federal Court in regard to a case that has been removed into it from the State Court are also different under the Act of 1875 from what they have been under any previous act.

Section 5 is in part as follows: That "if, in any suit commenced in a Circuit Court or removed from a State court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the

parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

It is important to note the difference between the language of this section in regard to the duty of the Federal Court and the language of the 3rd section in regard to the duty of the State Court.

In each section there is a provision that, under certain circumstances, each court "shall proceed no further" in the case. But from the two sections it is evident that it is the duty of the State court to accept the petition and bond, and proceed no further therein without examining the sufficiency of either, while the Federal Court shall proceed no further therein, only if a certain state of facts particularly specified "shall appear to the satisfaction of said Circuit Court." The direction to the State Court is "proceed no further;" the direction to the Federal Court is "proceed no further if you are not satisfied."

As to the duties of the Federal Court under this section, Judge Drummond said in the case of Osgood *v.* Chicago D. & V. R. R. Co., 6 Bissell, 330:

"The 5th section was intended to protect a party in case of "the improper removal of a suit from the State to the Fed- "eral Court, but the language of that section is peculiarly sig- "nifcant as affecting the motion now before the court.

"The copy of the record has been filed in this court, and "the law seems to indicate under what circumstances only, in "such an event, the case should be remanded back to the State "Court.

"It is when it shall appear to the satisfaction of the Federal "Court that the suit does not really and substantially involve "a dispute or controversy properly within the jurisdiction of "the court, or that the parties have been improperly or collu- "sively made, or joined, for the purpose of creating a case "cognizable under the act. It is true that the act prescribes "the manner in which the removal shall be made and the "directions of the law should be complied with. But the 5th "section does not authorize the court to remand or dismiss "the cause for the reason that it may appear that there was "any irregularity in the means taken to procure the removals.

"The purpose obviously was, if the record was filed in the "Federal Court under the law, and the court could see that it "had jurisdiction of the case, that it should retain it, notwith- "standing there might be defects in the manner of removal."

And again, after reargument, Judge Drummond and Judge Blodgett concurring, said:

"The fifth section contains provisions which are new. It is "true that in practice under previous laws, when a case came "into the Federal Court by removal from the State Court, "motions could be made to dismiss and remand the case, but "their decision depended on general principles. Now, the "fifth section controls the action of the Federal Court, both as "to the dismissal and remanding of cases. It did not intend "that the suit should be dismissed or remanded on account of "irregularities, provided it satisfactorily appeared that the "court had jurisdiction of the cause."

GROUNDS OF OBJECTION TO THE PETITION AND BOND AS PRESENTED IN THE COURTS BELOW.

For the convenience of reference we here quote the objections to the transfer as filed in the State Court by Mr. Brayton, the plaintiff's attorney, May 21st, 1875:

"1st. It is too late after one trial to remove the cause to the "U. S. Circuit Court, and after one term has passed at which "the cause could be tried after a second trial has been allowed.

"2nd. The application is made by motion and not by "petition.

"3d. The security is not good and sufficient security for the "purpose of removal.

"4th. It is too late after the cause has been reached and the "trial has commenced." Rec. (260), p. 62.

We also quote from the amended decree of the State Court, as follows:

"Plaintiff now offers in evidence the contract sued on in "this cause. Whereupon the defendant Wm. Dennison, "Trustee, asks leave to file an amended petition and bond for "the transfer of this cause to the United States Circuit Court, "a petition and bond for that purpose appearing to have been "filed with the Clerk of this court on the 20th day of May, "1875, one of the regular days of the present term of court, to "wit:

"Notice of the filing of the same having been brought to the "court, plaintiff by its attorneys objects that the bond is in-

" sufficient, one surety being an attorney and not eligible as a " surety on a bond in court under the law, and further that " the application to transfer this cause is too late, the cause " being reached now for trial and the trial of the same com- " menced. Whereupon the court sustains the objections of " plaintiffs in this behalf, to which ruling of the court, the de- " fendant, William Dennison, Trustee, by his counsel excepts, " and asks that his exceptions be made a matter of record; " which is accordingly done. When pending further proceed- " ings in said cause, court adjourns to May 22d, 1875." (See Record 260, page 112).

We also here quote the points as filed in the Federal Court on the motion to dismiss the cause, Oct. 13, 1875 :

" 1st. The application for removal to this court was not " made until after one trial in the State Court, and after the " commencement of the second trial.

" 2nd. The petition relied upon does not describe this suit, " and is not signed.

" 3d. The bond relied upon does not describe this suit, does " not apply to it, and the security is neither good nor suf- " ficient.

" 4th. No evidence was furnished to the State Court that " the petition and bond relied upon were intended for this " suit, or that the parties were not all residents of Iowa.

" 5th. After the petition and bond relied upon for renewal " were filed, said Dennison waived removal by proceeding to " trial in the State Court, stipulating that judgment and decree " should be entered of the May term of said court, and after " the same were entered, by appealing to the Supreme Court " of the State of Iowa.

" 6th. Said Dennison failed to enter a copy of the record in " this court until the seond day of this term" (see Record No. 30, p. 110).

We also quote the grounds stated by Mr. Brayton, plaintiff's attorney, on the motion to remand, May 24, 1876 :

" The plaintiff in the above entitled suit, moves the court to " remand the above entitled cause to the Circuit Court of " Delaware County, Iowa, for want of jurisdiction thereof by " this court, and assigns the following grounds therefor :

1st. " Said suit was commenced in said Delaware Circuit " Court, and was not removed to this court nor was any petition " or bond filed in or accepted by said Delaware Circuit Court, " for the removal of this suit to this court.

" 2d. Said suit was not removable to this court, as it does

"not and did not in said Delaware Circuit Court involve a con-
"troversy between citizens of different States.

"3d. Said suit does not and did not in said Delaware Circuit
"Court involve a controversy between citizens of different States,
"which can be wholly determined between them.

"4th. The petition relied upon is not signed nor does said
"petition or the bond relied upon, for the removal properly
"describe this suit.

"5th. The party applying for removal waived all right hereto
"by proceeding to trial in said Delaware Circuit Court, and
"stipulating that that court might render a decree in said suit,
"and also appealing to the Supreme Court of Iowa from the
"decree so rendered, after applying to that court for removal.

"6th. The application was made too late, being after decree
"rendered.

"7th. Said Lewis H. Meyer was not a party to said suit"
(see Record No. 30, p, 116.)

The petition for removal herein was made and filed May 19, 1875, about three months after the passage of the Act of March 3, 1875, regulating removals, which applied to suits then pending or thereafter bought, and which repealed all acts and parts of acts in conflict with the provisions thereof. It must therefore first be seen whether the removal properly came within the terms of the Act of 1875.

At the time the petition was filed, judgment in the suit had been entered against all the defendants except Dennison and Thompson, Trustees, and as Thompson was dead, and the State Court had not allowed and did not afterwards allow Meyer to become a codefendant, the suit must be considered as a suit against Dennison, Trustee, alone, at the time of the proceedings herein in question, and the only question remaining undetermined before the State Court at the time, was whether the lien of the plaintiff was paramount to that of the mortgage under which Dennison was Trustee.

The plaintiff was a citizen of Iowa, Dennison was a citizen of Ohio, and the controversy was wholly between citizens of different States, and could be fully determined as between them, and was therefore a case in which removal could be made under the 2d Section of the Act of March 3, 1875 (see the further discussion of this point, *post*, p. 45).

The 3d Section of the Act of '75, provides "*that whenever either "party or any one or more of the plaintiffs or defendants entitled "to remove any suit mentioned in the next preceding section, shall "desire to remove such suit from a State Court to the Circuit Court "of the United States Court, he or they may make and file a peti- "tion in such suit in such State Court before or at the term at which "said cause could be first tried, and before the trial thereof, for the "removal of such suit into the Circuit Court, to be held in the dis- "trict where such suit is pending, and shall make and file therewith "a bond, with good and sufficient surety*" (p. 471).

Having reference to the section of the Act just quoted, we say:

First.—DENNISON WAS A PARTY "ENTITLED TO REMOVE."

Dennison's claim to right of removal depended on the difference of citizenship between the plaintiff and himself. This difference was alleged in the petition of Dennison; it was not denied before the State Court or before the United States Court.

The original bill of the plaintiff herein alleged that the plaintiff was a corporation of the State of Iowa (p. 2).

The plaintiff's Attorney Braxton, in an affidavit filed on the motion for publication, swore that Dennison was a non-resident of the State of Iowa (p. 41).

Second.—THIS SUIT WAS A SUIT "MENTIONED" IN SECTION 2, OF THE ACT OF MARCH 3, 1875, DESIGNATING THE CLASSES OF SUITS IN WHICH REMOVALS COULD BE MADE.

This suit as to all the defendants except Dennison had been adjudged and determined. All that remained was a suit against Dennison alone. It would seem then as if this suit should be considered in its then state, as a suit, following the language of the first part of Section 2, "in which there was a controversy "between citizens of different States;" but if by reason of the fact that other defendants are mentioned in the title it is not to be considered such a suit, then certainly it is a suit in which (following the words of the last part of Section 2,) there was at the time of filing a controversy "which is wholly between citi-

"zens of different States, and which can be fully determined "as between them," and where in such case "either one or more "of the plaintiffs or defendants actually interested in such "controversy may remove said suit into the Circuit Court of "the United States for the proper district."

In the petition of Dennison it is stated that "said "cause can be fully and finally determined in the United "States Circuit Court for the District of Iowa." This fact was not denied in the objections made to the transfer in the State court, and it was not passed on by the State judge. So that so far as the action of the State court is concerned it must be considered as true that the cause itself was one in which a removal was proper upon the allegations stated in the petition.

In the Federal Court, however, among the grounds presented on motion to remand were these:

"*Second.*—Said suit was not removable to this court, as it "does not and did not in said Delaware Circuit Court involve "a controversy between citizens of different States."

Third.—Said suit "does not and did not in said Delaware "Circuit Court involve a controversy between citizens of differ- "ent States, which can be wholly determined between them."

These objections were not sustained because not founded on the facts.

The best evidence that the suit did involve a controversy between citizens of different States which could be wholly determined between them is found in the fact that the very controversy in question has been determined and passed on in the Federal court, in suit No. 29, where the only parties to the suit were Dennison & Meyer, the Trustees of the mortgage, plaintiffs, and the Delaware Railway Construction Company and the Delaware County Railroad Company, defendants, substantially the same parties who were the remaining parties to the suit in the Iowa State court at the time of the filing of the petition for removal.

See *French* vs. *Hay*, 22 Wall., 238.

Furthermore, all the authorities but one concur in holding that in a cause like this there was substantially a controversy which could be fully determined as between the parties citizens of different States, and which could be removed by one or more of them.

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Furthermore, all the authorities but one concur in holding that in a cause like this there was substantially a controversy which could be fully determined as between the parties citizens of different States, and which could be removed by one or more of them.

The right of a defendant, a citizen of another State, to remove where one or more defendants and the plaintiffs, were citizens of the State in the courts of which the suit was brought was denied by Judge Johnson in the case of Patterson *vs.* Corbin, 13 Blatch., 395; but this opinion has not been followed in any other circuit, and to so hold would be substantially to hold that the Act of 1875 restricted the right to remove in such cases less than it existed in former acts.

In the case of *Osgood* vs. *The Chicago, Danville & Vincennes Railroad Company*, 6 Bissell, p. 630, judges Drummond and Blodgett held that the case could be removed by the petition of one or more of the defendants or plaintiffs when they were the parties concerned in the main issue, and that the true rule was to determine what the main controversy was, and that then the parties to that issue on either side, or either of them could remove the cause if they were not citizens of the same State as the parties to that main issue on the other side.

See, also, *City of Chicago* vs. *Gage*, 6 Bissell, p. 467, especially 473.

See, also, *Scott* vs. *Clinton & Springfield Railroad Company*, 6 Bissell, 529.

See, also, *Hervey* vs. *The Illinois Midland Railroad Company*, 7 Bissell, 103, especially p. 110.

See also, Opinion of Justice Strong, in *Taylor* vs. *Rockefeller*, Vol. 7, No. 18, Central Law Journal, page 349.

See, also, to the same effect, the opinion of Justice Miller in *Arrapahoe Co. Com'rs* vs. *Kansas Pacific Railway Company*, 4 Dillon, 278.

See, also, to the same effect, the opinion of Justice Bradley in *Girardey* vs. *Moore*, 5 Central Law Journal, 78.

See, also, to the same effect, the decision of Mr. Justice Davis and Judge Treat in the case of *Turner Brothers* vs. *The Farmers' Loan and Trust Company* and others as cited, Dillon on Removal of Causes, p. 34.

See, also, the opinion of Justice Harlan in *Ryan* vs. *Young* (the Reporter, vol. 8, p. 229) as implying a similar conclusion.

(See further discussion of this point *post* p. 45.)

Third.—DENNISON MADE "A PETITION IN SUCH SUIT IN SUCH STATE COURT."

The petition as made has already been quoted.

It was not made by Dennison alone; it was not sworn to by him or by any one; it was not signed by him or by any one, if by signature is meant the autograph writing of a name at the end of the petition. And yet we claim that Dennison did, in the words of the Statute, "make" a petition. The Statute does not declare the petition neet be signed or verified.

Generally speaking, a petition need not be in writing, but may be oral. The words, however, of this Statute, "make and file," show that in this case the petition must be in writing or in print. It however need not be signed. The only object of signing a petition is for identification, and that is not necessary if the petition is otherwise properly identified. The petition that was made herein was entitled in the suit, and the name of the petitioner, Dennison, was recited in the body of the petition. If the petition had been actually signed by Dennison, his signature could not have been probably identified by the clerk or the judge.

The ordinary bill in an equity suit is in substance a petition, but it is not necessary that the orator should sign it. By the practice and the rules of the equity courts, it is necessary that the bill of complaint should be signed by the counsel as evidencing the fact that he, the counsel, believes that the orator has a proper case for the consideration of the court, but there is no such rule or practice in regard to petitions. It is not contended herein that the better practice would not be that the petition should be signed by the attorney, but it is insisted on that there is nothing in the statute itself or in the practice of the court, which makes the signature of the petitioner or his attorney a necessary part thereof. In this case the genuineness of the petition as an act done in behalf of the petitioner Dennison was never questioned, before either the State or the Circuit Court, and was, of course, insisted on in both courts by the counsel of Dennison, who gave thus their certificate to its genuineness in the most responsible way.

The bond moreover that was filed was signed by the attorneys of the petitioners, and if any signature is necessary, then this signature must be considered as sufficient, for the petition

and bond are really but part of the whole, and are to be taken and read together.

Still less is verification necessary to the making of a petition.

Osgood vs. *Chicago, Danville & Vincennes R. R.*, 6 Bissell, p. 300.

Conner vs. *Scott*, 3 Cent. L. J., 305.

Merchants' Bank vs. *Wheeler*, 13 Blatchford, 218.

The ordinary bill of complaint in an equity suit is not of necessity sworn to independently of any statute or rules of the court, and no reason occurs why there should be a different rule as to a petition. The statutes in regard to removal of causes to the United States Court, have provided that in certain cases the petition should be verified, or that an affidavit should accompany it.

Note, for example, that in paragraph 3 of section 639 of the Revised Statutes, an affidavit is necessary to accompany a petition when the party seeks removal of the cause, on the ground that he does not expect to be able to obtain justice in the State court.

Note again, that in section 640 of the Revised Statutes, there is a provision for the removal of suits against Corporations organized under the law of the United States, "upon the petition of such defendant verified by oath."

Note again, that section 641 of the Revised Statutes provides for the removal of causes against persons denied any civil right.

"Upon the petition of such defendant filed in said State "court, at any time before the trial for final hearing of the "cause, stating the facts and verified by oath."

Note again, that section 643 of the Revised Statutes provides that the petition for removal of suits in cases of prosecutions against revenue officers and officers coming under the registration law, "shall be verified by affidavit."

Note again, that by section 647 of the Revised Statutes, the removal of suits where parties claim lands under titles from different States, is provided for if either party "before the trial states to the court and makes affidavit if they require it," etc., etc.

Under the Revised Statutes, the removal contemplated in the cases mentioned in paragraphs 1 and 2, of section 639; that

is to speak generally, in cases where the parties are residents of different States, can be made upon a petition filed, and the fact that no verification of this petition was mentioned in such section, indicates that in the opinion of Congress, a verified petition was not necessary in cases where the removal was based upon differences of citizenship.

Now, the Statute of March 3rd, 1875, did not modify the sections of the Revised Statutes above quoted, in which a verified petition was necessary, but left them as they were. Nor so far as any necessity for the verification of any petition is concerned, did it modify that section, which referred to removals by petition in cases depending on difference of citizen ship.

The words "make and file" a petition in such suit in such State court, of the third section of the Act of March 3rd, 1875, are the same in meaning as the words "the petition of such defendant, filed" in said State court, of section 639 of the Revised Statutes.

The only section of the Revised Statutes, in which there is a reference to a verification, and which is also incorporated into the Act of March 3, 1875, is section 647 above referred to, and this section is in substance the same as the latter part of section 3 of the Act of 1875, which provides with reference to the removal of causes concerning title to land between citizens of the same State, that one or more of the plaintiffs or defendants before the trial "may state to the court and make affidavit if the court require it." Here the word "they" of the Revised Statute is made more definite by the use instead thereof of the word "court."

This comparison of the statutes seems to leave it beyond any doubt that while in some cases Congress thought that a petition for removal should be verified, yet it also was of the opinion that when the question of removal depended simply on differences of citizenship, or also upon the fact whether or not the cause could be determined as between the parties in the Circuit Court, it designedly omitted to make the verification of the petition a necessity, and apparently with the intention of placing the right of removal in any such case as far as possible beyond any control of the State court, whose control over the cause until remanded was to cease upon the simple filing of an unverified petition, setting forth the facts of such citizenship, accompanied with a specified bond.

Fourth.—THE PETITION WAS FILED "IN SUCH SUIT IN SUCH STATE COURT."

No objection was made in the State court that it was not so filed.

But in the motion in the Federal Court to remand it is urged that no petition or bond was "filed in or accepted by said Delaware Circuit Court for the removal of this suit to this court."

And further that said petition and bond did not "properly describe this suit."

The petition was filed with the Clerk of the State Court, and it is not understood that it is claimed herein that to so file a petition is not to file it "in such State court," in the words of the Statute.

The petition mentioned as defendants only Dennison and Meyer, the latter of whom was at the time seeking to become a defendant. The petition, however, includes other defendants in these words: "The Delaware Railroad Company and all persons who have come in as 'interveners.'" In the bond the suit is stated as a cause pending in said court, wherein "the Delaware Railroad Construction Company, plaintiff, and the said Lewis H. Meyer, Trustee, successor to John Edgar Thompson and Wm. Dennison, Trustees, and many others are defendants."

There can be no pretence that the petition and bond were not intended to be filed in this suit; or that they were filed in any other suit than this; and if there has been any mistake in that the petition did not name all the parties as defendants in the title of the cause, that mistake has misled no one and has injured no one.

It must be considered that the State court regarded the petition and bond as filed in this suit, and certainly after that it has so done, no other court will question the fact.

The words of the amended decree of the State court in regard thereto are as follows: "The defendant William Dennison, Trustee, asks leave to file an amended petition and bond for the transfer of this cause to the United States Circuit Court. *A petition and bond for that purpose appear to have been filed with the Clerk of this Court on the* 19*th of May*, 1875."

Herein then the court recognized the petition of the 19th of May, as filed in this cause; and it is submitted that when before the State court, both the plaintiffs' attorney and the court itself recognized that petition as filed in that court in this cause; then the plaintiffs cannot in the United States Court avail themselves of any slight defect in the entitling of the petition, which defect has in no way misled.

Fifth.—THE PETITION OF MAY 19TH WAS THE PETITION OF THE DEFENDANT DENNISON.

It was in terms the petition both of Dennison and Meyer, and was filed on the same day as the petition of Meyer to be made a codefendant.

There can be no doubt but that Meyer had a right to become a codefendant. He is a party of record associated with the Trustee Dennison in both the suits that have been appealed herein from the Federal Court.

In a case cited from the Southern District of Illinois, in Dillon on The Removal of Causes, page 35, Judge Davis held that a cause could be removed to the United States Court by a person whom the State Court had refused to make a party in the State Court, but who was from the nature of the case clearly a necessary party.

Still more then, can a case be removed on the petition of a person who is a party defendant and with whom there is joined in the petition a person who has sought to be a party defendant, but has been refused. The relation of Dennison and Meyer was that of co-trustees. The Trustees Dennison and Thompson had originally been made parties defendant, and it was alleged in the petition of Dennison, asking for a new trial, that his co-trustee Thompson had died, which fact was also alleged by Meyer in his petition to become a co-defendant. And in the same petition it was further alleged that Meyer had been duly appointed in the place of Thompson, deceased. And the truth of the same was also sworn to by the attorney of Dennison and Meyer (p. 61.) But it was objected in behalf of the plaintiff that there was no evidence before the court of the appointment of Meyer as Trustee, and this objection was held good by the court.

(See the Amended Decree, No. 260, p. 111.)

But the fact that Dennison was a Trustee was not denied in either court, and if the petition of May 19th, is good in other respects, it cannot be that this court will hold contrary to the wishes of Dennison, that that petition was not the petition of Dennison because it was also the petition of Meyer, who was not proven in the State Court to have been a proper party, but whom the Federal Court by its own records knew to be a proper party.

But in the State Court no objection as to the fact that the petition was a joint one, instead of a separate one for Dennison alone, was made either by counsel or court, and therefore the petition must be considered in this court as having in the State Court been adopted as a proper petition of Dennison, alone and all objections thereto by reason of the joining of Meyer therein, as waived.

And when this objection to the petition is considered in No. 30, with reference to the duty of the Circuit Court to have remanded the cause, then it must be remembered that the record shows in that case that the plaintiff's counsel stipulated on January 14, 1876, that Meyer should be considered as joining in the answer of Dennison, previously filed in the State court, and stipulated further in substance that the issue made as to Dennison and Meyer should be the same. All this, however, "is not to be regarded as a waiver of the plaintiff's objection to the right of this court to try the case."

(See Record, No. 30, p. 114.)

(This agreement was made four months before the motion to remand was made.)

The pleadings also in No. 29, which was the suit brought originally in the Federal court by Dennison and Myer to foreclose, their mortgage averred that Dennison and Meyer were the Trustees, and this suit was begun on the 4th of May, 1875, more than a fortnight before the filing of the petition by Meyer and Dennison in the State Court for the removal of the cause there.

In the suit No. 29, in the Federal Ccourt, the Davenport Railway Construction Company was a party, and in its cross bill (Record 209, p. 86), substantially admitted that Dennison and Meyer were the Trustees under the mortgage. So it is evident that the petition of May 19th, was the petition of those who were the proper defendants,

and if one of them by the act of the State Court was not allowed, in fact, to become so, then this court will not hold the petition of these two defendants not to have been the petition of Dennison, where both the State Court and the plaintiff's attorney in the State Court, failed to object to the petition as not being the petition of Dennison, but will regard the objection made in the United States Court, on the motion to remand that the petition was not the petition of Dennison, as evidently an afterthought founded on a mere possible informality which has misled no one, and the allowance of the present importance of which as a valid objection to the petition, would be to do a substantial injustice.

Sixth.—THE PETITION HEREIN, OF MAY 19TH, WAS FILED "BEFORE OR AT THE TERM AT WHICH SAID CAUSE COULD BE FIRST TRIED."

So far as a part of this cause was concerned, it had been tried and adjudged as against some of the defendants, but without any service upon the Trustees, Dennison and Thompson. An order for publication was then obtained, and thereafter a judgment by default was entered against them on the 22d of May, 1874, at the May Term (p. 49).

Afterwards, on the 26th January, 1875, on the petition for a new trial of Dennison, the surviving Trustee, the following is the record of the court:

"Whereupon, it appearing to the court that the service "upon the said surviving Trustee was by publication only, and "that he and those whom he represents are entitled to a new "trial under the law; and it further appearing to the court "that the said surviving Trustee has furnished security for the "costs of the new trial herein, satisfactory to said plaintiff, "it is ordered by the court that a new trial in this cause be "granted to said surviving Trustee, William Dennison; that "the answer offered by the said defendant be filed, and that "this cause stand continued to the next term of this court" (p. 52).

The above order was made on the second day of the January Term, 1875. On the eighth day of the same term, namely, February 2d, 1875, the plaintiff's attorney filed a motion to

strike out Dennison's answer, because it was not verified (p. 52).

The next term of the court was the May Term, 1875, the first day of which was May 17th, and on that day, on consideration by the court, Dennison's answer was stricken out, and two days' later permission was given to file an amended answer (p. 53).

The petition to remove this cause was filed at this May Term, 1875, and the question now is, was that filing in due season under the statute, which was not passed until after the immediately preceding term of the court?

At that previous term of the court, according to Section 639 of Revised Statutes, a petition for removal herein might have been filed at any time "before trial."

See the decisions of the Supreme Court in *Vose* vs. *Yulee.*

The act of March 3d, 1875, applied, however, to pending suits as well as to those brought thereafter, and it has been held that as to a pending cause it did not take away an existing right to file a petition at any time before trial, and enact that in such case if the petition had not, as a fact, been filed at the first term, even before the passage of this act, at which the cause could have been tried, then no petition could thereafter be filed, but that the true meaning of the act was, that as to a pending cause the right to file a petition after the passage of this Act of 1875 was reserved during the first term after such passage, at which term that pending cause could be tried.

See the following decisions to this effect:

Merchants & Manufacturers' National Bank vs. *Wheeler* (Johnson, Circuit Judge), 13 Blatchford, 218.

Baker vs. *Peterson*, (Dillon and Love, JJ.), 4 Dillon, 562.

Andrews' Executors vs. *Garrett* (Ewing, District Judge), 2 Central Law Journal, 797.

Crane vs. *Reeder* (Emmons, Circuit Judge). 15 Albany Law Journal, 103.

Hoadley vs. *San Francisco* (Sawyer, Circuit Judge), 3 Sawyer, 552.

But even if the Act of March 3d, 1875, should be considered to have taken away the right in pending causes to file a petition for removal if those causes could have been tried at any term before the passage of the act; still in this cause the petition was filed in time, because the May Term of 1875 was the first term at which the cause could be tried.

The Iowa Code bearing on this act is as follows:

Sec. 2744: "Except where otherwise provided, causes shall "be tried at the first term, after legal and timely service has "been made."

"SEC. 2745: "The appearance term shall not be the trial "term for equitable actions, except those brought for divorces, "to foreclose mortgages and other instruments in writing, "whereby a lien or charge on property is created, or to en- "force mechanics' liens."

It is argued in behalf of the respondents herein, that legal and timely service herein was made at the May Term of 1874, by publication, and that the appearance term was the January Term of 1875, and that the Trial Term for this case was the Appearance Term.

To which we say:

(*A*). Legal and timely service was not made at the May Term of 1874. The service by publication is only legal and timely service in case the party after publication and default does not, within a certain time afterwards appear, and in this case there was no legal and timely service till the January Term of 1875, when a new trial under the law was given to Dennison.

(*B.*) The notice that was given by publication called for an appearance at the May Term, '74, at which term, however, appearance was not made; but, nevertheless, it is not correct to say that the January Term, '75, was the "Appearance Term." The proceeding at the January Term was not an appearance, in pursuance to the service by publication, for that appearance should have been made at the May Term, and judgment by default was taken, because the appearance was not then made.

(*C.*) But even if the petition for a new trial, at the January Term, should be considered as an appearance at that term,

and that term be considered as "the Appearance Term," still, in equitable actions, the Appearance Term is not the Trial Term, except for those causes brought "for divorce, to foreclose mortgages, and other instruments in writing, whereby a lien or charge on property is created, or to enforce mechanics' liens."

The proceeding to enforce a mechanics' lien, is in this section of the Code recognized as an equitable action. But in the position in which this suit exists, as against Dennison, Trustee, although clearly it is an equitable action, yet it may, perhaps, be doubted whether it can be fairly considered in its present state as an action "to enforce a mechanic's lien." But, even if it is such an action, the provision of sec. 2,745 of the Iowa Code, discriminating between the Trial Terms of different kinds of equitable actions, has been held unconstitutional by the Supreme Court of that State (Sherwin *agst.* Sherwin), 44 Iowa, p. 192), in an action to foreclose a mortgage, and Judges Dillon and Love, in the case of Palmer *against* Call (4 Dillon, 566), have held that a suit, to foreclose a mortgage, under the Code of Iowa, may be removed to the United States Court, at the next term after the Appearance Term. And this same rule should be undoubtedly applicable to actions to enforce a mechanics' lien.

(*D.*) But the first term, at which this cause could have been tried was the May Term, 1875, the term at which this petition was filed; and this was so by the order of the court itself, and without the application of either party, as is evident from the proceedings of the court, already quoted, of January 26, 1875, in which it appears that the same order, which allowed the defendant Dennison to have a new trial, and to file an answer, also ordered that the cause "*stand continued to the next Term of the court.*"

(*E.*) Again, the cause could not have been tried before the May Term, 1875, because it was not at issue till then.

True it is, that the defendant Dennison, at the January Term, was allowed to file an answer, but at the same time a motion was made to strike out the same, and this motion, after argument, was allowed. at the first day of the May Term. And on the third day of the May Term a leave to file an amended answer was given, which was afterwards also stricken

out, and the answer and replication, as a matter of fact, was not filed till after the trial of the cause was begun, on May 22 (see the Amended Decree, p. 111).

This cause, then, could not have been tried either under the Iowa Code, or under the orders of the court, or with an issue made up before the May Term, 1875, at which Term the petition was filed.

Seventh.—THE PETITION WAS FILED "BEFORE THE TRIAL OF THE CAUSE."

The petition was filed on May 19th. The trial of the cause was not begun till May 21st.

Therefore, the petition was certainly filed before the trial.

But it is argued, that though the petition was filed before the trial, yet it was not called to the attention of the court till after the trial was begun, and that, therefore, the filing before the trial was of no avail. The filing before the trial is the only thing that is made necessary by the statute. The amended final decree (p. 111), states the situation of affairs from the 19th to the 22d days of May.

The defendants' attorney was trying to have Meyer made a co-defendant, and was trying to remove the cause for both defendants, or for either of them, and was offering such evidence and bonds as was possible.

The court apparently was determined that Meyer should not be made a defendant, and that the cause should not be removed. It would appear from the record (p. 57 and 59), that a motion for continuance was made and denied on the 20th of May, but in the amended decree (Record, p. 111), this motion is not alluded to or considered, leaving it to a certain extent doubtful whether this motion is considered as having been made. It will be noted here that the petition for removal was filed May 19th, and the bond was filed on the 20th, and it may very well be that it was not filed until after the motion for continuance was denied. It also appears from the amended decree that after the court had refused to allow Meyer to become a codefendant, the plaintiff offered in evidence the contract sued on in this cause and that thereupon the defendant, Dennison, asked leave to file an amended petition and bond, and

called the court's attention to the petition and bond that had been previously filed, but that the court refused permission to file an amended petition and bond, and did not consider the petition and bond already filed as sufficient, and went on with the cause.

It will appear also from the amended decree that after the offering in evidence of the contract referred to, an amended answer was filed, and a replication was filed. It is claimed in behalf of the defendant in error in No. 260 that the offering in evidence of the contract referred to was a beginning of the trial, and that although the petition and bond in question were previously filed, yet as the court did not know of this filing till after the offering in evidence of this contract, then it must be considered that this filing was not effectual till as of a time after the offering in evidence of this contract.

It is undoubtedly true that the practice should not be allowed of withholding a knowledge of the filing of a petition from the State court until such time in the trial as the party filing the petition should determine that on the whole he had better try to remove the cause. But the facts in this case show that there was no intentional withholding of this knowledge from the court.

The petition and bond filed were in the name of Meyer and Dennison. The moment the court refused to allow Meyer to become a party the defendants attorneys moved for leave to amend this petition and bond to conform, so that it would be the petition of Dennison alone. But meanwhile and apparently without any propriety, and at a time when the cause was not really at issue as there was no answer and no replication, the plaintiff's attorney offered in evidence the contract between the plaintiff and the railroad company, the offering of which at any time was a mere formal matter and would occupy but a moment, and was probably done for the very purpose of trying to prevent the desired removal of the cause.

It will be noticed that in the motion in behalf of Dennison to amend the final decree, it is not admitted that the contract in question was offered in evidence; but, assuming that it was so offered, as a matter of fact the whole of the findings of the court taken together show that at the time the filing of the petition and bond was called to the attention of the court the trial in the cause had not really commenced, and that not only

was the petition and bond filed before the trial of the cause but the court knew of it before the beginning of the trial of the cause.

The trial of the cause did not really begin till the 22d of May, when the plaintiff was allowed to file a replication and the defendant an amended answer; and when, in the word of the findings, "the court now proceeds with the trial of said cause on the issues joined therein" (Record, p. 112).

In Vose *vs.* Yulee the filing of the petition and bond was not called to the attention of the court till after the cause had been called for trial, and after the jury had been sworn, and as to this the Chief Justice in his opinion says:

"We think the application was made in time. The trial had not been commenced. The most that can be said is that preparations were being made for a trial."

Now, in Vose *vs* Yulee the trial had been commenced to a greater extent than it had been in this case. The calling of a case and the swearing of a jury are more formal acts than the simple presentation in evidence of a written contract while the other side is presenting various motions as to parties and removal, and when there exists as yet neither answer or replication duly filed in the cause.

But, under all the authorities, the time of presentation of the fact of the filing of the petition to the knowledge of the court is of no importance, except as bearing upon the question as to whether or no the party is thereby to be considered as having waived the right that he otherwise had to removal, from having previously filed a proper petition and bond, and certainly the facts in this case show not only that there was no intended waiver of such right, but they also show the most active assertion of all the rights of non-resident defendants to a removal, and it was only after the court had denied all their rights as they then existed upon papers filed, and had refused every opportunity to file amended papers, that on the following day, May 22d, the court "now proceeds with the trial of said cause."

Eighth.—THE BOND FILED WAS SUFFICIENT UNDER THE STATUTE.

Under the decisions cited, the State Court had no right to

pass upon the sufficiency of the bond; it did, however, so pass. But the only objection made to the bond in that court, was that "the security was not good and sufficient for the purpose of removal," and for the reason as stated in the final decree that one surety was "an attorney and not eligible as a surety on a bond in court under the law." The State courts sustained this objection and rejected the bond, but we say wrongfully.

It is not a good objection to the sufficiency of a surety on a removal bond that under the State law he is not eligible. The bond to be given is a bond to be given under the statutes of the United States, and the several States cannot each for itself by its own statutes determine what classes of its citizens can sign such a bond.

But even if an attorney was not eligible to sign as surety the fact was that he had signed, and having done so, that bond was good and sufficient security, and he could not in a suit upon the bond have availed himself of the defense that under the State statute he was not eligible to sign such a bond.

And again, even if one of the sureties to the bond was an attorney (and there was nothing in the bond to show that fact), that objection did not affect the other surety, and no objection was ever made as to him, and since the statute does not specify the number of sureties no reason exists why one surety unobjected to should not have been considered as offering good and sufficient security.

In the Federal Court it was objected to the bond on the motion to dismiss that "it does not describe this suit, does not apply to it, and the security is neither good nor sufficient." And again in the motion to remand it was urged "nor does said petition or the bond relied upon for the removal, properly describe this suit."

We have already considered the question as to the sufficiency of the sureties. The objection to the bond that it did not describe the suit, is one that did not occur to the plaintiff's attorneys or to the State Court, while the bond was before the State Court, and to pretend in the Federal Court that under these circumstances, it did not describe the suit, is a mere after thought and contrary to the facts. For the bond did describe the suit in such a way as to identify it beyond question. The relation of Meyer to it was stated as that of successor to

John Edgar Thompson, and there could have been no doubt, whatever, what suit was meant. And as we have seen, nobody in the State Court did doubt what suit was meant, or in what suit the bond was filed, and the bond was rejected in the suit in question, not because it was not filed in the suit, but simply because one of the sureties was an attorney at law.

Moreover it may be doubted whether under the fifth Section of the Act of 1875, the Federal Court or this court is called upon to consider what at the most must be regarded as trifling irregularities in petitions or bonds, which petitions and bonds have resulted in the transfer of the record, as the bond provided should be done, and in the suit which all parties understood was referred to, both in the petition and the bond.

The words of Judge Drummond, in *Osgood* v. *The Chicago D. & V. R. R. Co.*, 6 *Bissell*, 330, are applicable here. They are as follows: "But the 5th Section does not authorize the court to remand or dismiss the cause for the reason that it may appear that there was any irregularity in the means taken to procure the removals. The purpose obviously was, if the record was filed in the Federal Court under the law, and the court could see that it had jurisdiction of the case, that it should retain it, notwithstanding there might be defects in the manner of removal."

As there appears to be some danger of obscuration of the true questions involved, by the large and somewhat confused mass of matter appearing in these various records, we desire to bring together and here present, what we regard as the salient points.

The Practical or Pecuniary Questions Presented.

The practical or pecuniary questions presented by these three records, are as follows:

1. Whether, for the *balance* of $51,930.54 claimed by the Delaware Construction Company, to be due to them upon their contract for grading the Delaware County Section of this railroad, they have or had a mechanics lien upon that section of

the road, superior to that of the mortgage bondholders, whose mortgage was duly recorded June 4, 1872, while no notice of the mechanics lien claim was filed until December 20, 1872?

If this question be decided in favor of the mortgage bondholders, the entire controversy is thereby ended, but if decided adversely to them, there comes the question, of far greater pecuniary importance than the primary one; whether the mechanics lien claimants, by their very peculiar proceedings, and by the aid and countenance afforded to them by what appear to us to be very extraordinary proceedings of the Iowa State Court, have legally succeeded in converting their lien, for this comparatively small balance, which by the statute laws of Iowa was enforceable only by "proceedings in equity," into an absolute and indefeasible title to this entire section of the road, twenty-five miles in length, and worth many times the amount of alleged liens; and this without affording to the mortgage bondholders or their Trustees, *any opportunity whatever* for a day, an hour, or *even a minute*, to free their property from the lien by payment of its amount, upon judicial ascertainment of its existence as paramount to their mortgage title.

The pecuniary importance of this question will be readily seen by the following references to the record:

(*Record No.* 30). The balance claimed to be due on the grading contract was $55,000 and interest—*print page* 13—By their complaint or petition, the lien claimants admitted their receipt of cash payments on account of the contract to the extent of $139,189.46—*page* 6. The balance found due by the referee, and for which judgment was rendered, and a lien established against the railroad company, was $51,930.54—*page* 39.

Thus the cost of the grading, including ties and material for bridges, etc., was $190,000. To this is to be added the cost of the *iron rails*, chairs and spikes, the track-laying, the right of way, stations and depot buildings, the engineering, and divers appurtenances and incidentals.

The lien claimants, by their cross-bill filed in the bondholders' foreclosure suit, are seeking, not only to have this section of the road delivered over to them, under their claim of its ab-

lute ownership in virtue of the Sheriff's deed, but likewise to recover damages for the witholding of its possession from them by the Receiver in the bondholders' foreclosure suit, from and after May 4, 1875, when, they allege, it became their property—and by this cross-bill (*Record No.* 209—*now* 20—*print page* 36), they claim these damages, or value of use at the rate of $2,000 per month, or $24,000 a year.

One of their witnesses, Richard Boon (*Record No.* 29, *p.* 242) puts the rental value at $2,500 to $3,000 per month.

Another of their witnesses, A. E. Martin (*Record No.* 29, *pages* 247–8), puts it at $2,000 per month, which, he says, "would be *only the interest upon the value of the road at six per cent.*" and undertakes to say it could be rented at that rate.

According to their evidence, therefore, this section of the road is worth $400,000.

By the terms of the mortgage held by our clients, and of the bonds which it was given to secure, the bonds were to be issued at the rate of $20,000 per mile (*Record No.* 29, *pp.* 23, 24).

The method by which these lien claimants claim to have succeeded in gaining to themselves the absolute and indefeasible title to this twenty-five miles of road, of the value of $400,000 in satisfaction of their alleged lien claim of $51,000, is simply this:

They commenced a suit in equity for the establishment and enforcement of their asserted lien, *purporting to be* against the railroad company, and the Trustees of the mortgage, as defendants.

The mortgage Trustees being non-residents, *without undertaking to serve them with process, even by publication*, they sever the suit, proceed to trial against the railroad company, when and within less than a month after its commencement, *obtain a final judgment against the railroad company* on 6 February, 1874, adjudging the balance of $51,000 to be due, and establishing a mechanics lien for it as *against the railroad company*—and purporting to continue the cause as against the *remaining* defendants.

On this judgment they issue a special execution against the railroad company, the Sheriff levies upon the section of road in question, *as the property of the railroad company*, and under

this levy makes a sale on *May* 4, 1874, and the plaintiff, through one Eddy as a Trustee for them, buy it in for the amount of their debt.

Upon this sale there is given a Sheriff's deed, which is the *sole foundation* of our adversaries' claim of title to this road *No other sale was ever made or attempted to be made.*

Up to a date subsequent to this Sheriff's sale there was no pretence of establishment of this alleged lien as against those bondholders or their Trustees. After obtaining judgment against the railroad company, the claimants filed a supplemental petition seeking to establish their lien as paramount to the mortgage, obtained an order for publication, and published accordingly a notice addressed to the Trustees, of which *the return day was on May* 18th, fourteen days *after* the Sheriff's sale.

Thus, at the Sheriff's sale, there was *no exposure* of the property *to the competition of bidders as a property sold free from the mortgage*, for satisfaction of the mechanics lien.

The presumption must be, that if thus fairly exposed to sale, it would have brought some reasonable approach to its value, and not have been permitted to be snapped up, as here, by the pursuing creditor for the amount of his debt, not over one-eighth of its value.

It is to be recollected that the statute under which this lien is claimed, provides that the lien shall be enforced only by means of *proceedings in equity*, which certainly does not authorize such haphazard proceeding as this, for the purpose of cutting off other titles or liens. If the lien was to be enforced against the titles of other parties, there should have been pursued the usual and legitimate course of a court of equity, viz., to adjudicate upon the rights of the parties, and determine just what should be sold, and by what title, so that bidders might know what they would acquire, and an opportunity be afforded for obtaining a fair price upon the sale.

In pursuing their scheme for snapping up this property for a trifling sum, the plaintiffs took a course which effectually precluded substantial competition in bidding. The sale was

made merely under a judgment against the railroad company, with a large mortgage of prior date to the judgment apparent of record, and no adjudication subordinating the mortgage to the judgment, or to the lien upon which it was founded.

And they likewise took good care to give no notice to the mortgagees of the Sheriff's sale, which was designed to be the means of eventually cutting them off entirely.

The mortgagees residing in other States, *no notice whatever* was given to them save a short publication in an Iowa newspaper, and *even of that* the *return day* was *fourteen days subsequent* to the Sheriff's sale.

Such being the course pursued by the lien plaintiffs, it is too plain for dispute, that when, subsequently, they took proceedings in equity for establishing their mechanics lien as paramount to the mortgage title, if the Court of Equity decided in favor of such priority, the only proper course was, then to decree a sale of the property to be made in such manner as that bidders might know and understand that it was to be sold free of the mortgage title; giving, of course, the opportunity to the mortgagees, to avoid *any* sale by paying the debt for which the lien was adjudged prior to the day of sale if they should choose to do so; or, *at the worst*, if the previous Sheriff's sale, on the judgment against the railroad company alone, were to be permitted to have *any* effect as against the mortgagees, as we submit should not have been allowed at all, the principles of a Court of Equity could certainly allow it to go no further against the mortgagees, than to decree, that they should stand foreclosed by the old Sheriff's sale, made under the decree against the railroad company alone, *unless* the mortgagees should pay the debt, or redeem from the old sale within some reasonable time fixed by the decree.

Instead of this, the Iowa State Court upon refusing to recognize the transfer of this controversy to the Federal Tribunal, in the first place, utterly refused to allow Meyer, one of the mortgage Trustees (whom the bondholders had duly appointed in place of the deceased Trustee, Thomson, in perference of an express provision of the mortgage deed) to be heard at all, in support of the rights of the beneficiaries of his trust, and

then proceeding to an adjudication as against Dennison the other Trustee, after holding that the mechanics lien was paramount to the mortgage, undertook *by its own mere act to convert such lien into an absolute title to the property, and to vest it in the lienors*, though its value was eight times the amount of the lien, and *without giving to the mortgagees, whose title was thus undertaken to be divested, any opportunity whatever to discharge their property from the lien by paying its amount*, or have the property sold under a clear title so as to afford a chance of its bringing a price equal or approaching to its value.

This decree was so manifestly wrong, unjust, and illegal, that we think we cannot be blamed for calling it outrageous.

Surely, these mortgagees were not, in the slightest degree, blameworthy for contesting this alleged lien claim upon their property; they were utter strangers to it and its consideration, and had taken their mortgage in utter ignorance of its existence. Six months after the taking of their mortgage the first notice of its existence was given by filing the lien claim, and long afterwards it was attempted to be sprung upon them as a lien prior to their mortgage, by reason of an alleged *unrecorded* contract of earlier date.

The opinion of the United States Circuit Court was that the mortgage was paramount to the mechanics lien; the State Court held otherwise; and this may be well enough regarded as a fair difference of opinion, though we think and trust this court will so hold that the Circuit Court of the United States was in the right.

But, surely, it cannot be imputed to the bondholders or their Trustees as a fault that they saw fit to present this question of priority of lien for judicial determination. If it were rightfully decided against them, there was no legal or equitable ground for requiring them to do more than pay the amount of the lien, with the costs of litigation, in order to clear their property from its effect, and there is *not even a shadow* of justification for this attempt of the State Court litigant, and a State Court judge, to punish the bondholders for raising the question, by *confiscating* their property, worth eight times the amount of the lien.

Yet this is precisely what the State court attempted to do. At the time of its decree of May, 22d, 1875, after refusing to

recognize the transfer to the Federal Court, the statutory year for redemption from the original Sheriff's sale on the judgment against the railroad company above, was already expired. And the effect of that State Court judgment, if it is to be now allowed to stand, and to have the effect which our adversaries claim for it, was, *at the instant of its rendition*, to convert this asserted lien into an absolute, and indefeasible title to the property of eight times its value, without allowing to the owner of the property any opportunity whatever to avoid that result by paying the amount due.

We think it safe to assume that this court will not permit any such wrong to be accomplished, unless there be technical reasons absolutely forcing it to do so; and we trust to show with entire clearness, not only that there are no such technical reasons, but that such a result would be as plainly in violation of the fixed rules of law and procedure, as it would be in violation of equity and justice.

The Conflict as to Jurisdiction.

As to the conflict of jurisdiction between the Federal and State tribunals, the questions presented:

1. Was the case, in respect of parties litigant and status of the controversy, such as to give the right of removal on the ground of difference in citizenship, under the Act of March, 3, 1875?

2. Was the application to remove made in time?

3. Were the petition and bond legally sufficient?

4. If there existed a right of removal and the necessary steps to that end were taken, were they subsequently waived by the party seeking to remove?

These questions have been already discussed with so much amplitude, that we purpose to do here little more than summarize what we regard as the more important points.

The *first* question is the one which we suppose the court has regarded as the more important, and as probably the chief reason for directing a re-argument.

We fully appreciate the great importance of the questions inevitably presented by the Act of March 3, 1875, as to the right to remove under it an *entire cause* in which there is *a controversy* between citizens of different States, separately determinable as between them, while at the same time there is another controversy pending in the same cause between citizens of the same State, as also of the question of the right of removal under that Act, where a part of the parties of one side are of different citizenship from their adversaries and others part of the same citizenship, as likewise of some of the other questions of construction which the Act of 1875 presents, and we have presented arguments and authorities upon these important and interesting questions with such care as we deemed due to them; and yet we desire here to say with entire frankness that it appears to us entirely clear that none of these questions upon which there is fair room for difference of opinion really arise in this case; that it is only needful for one correctly to understand "*between whom as parties this cause was pending*, and what was the status of the suit" at the time of the filing of the removal papers, in order to perceive that the case was one for removal under the Act of 1875, so plainly as not to admit of a rational doubt.

THE PARTIES AND PENDING CONTROVERSIES AT THE TIME OF THE FILING OF THE PETITION FOR REMOVAL.

Between whom, then, as parties, was this cause pending at the time of the application for removal in May, 1875, and what controversy or controversies was or were pending between them?

It appears to us indisputable that the *only parties* to the suit, as then pending, were,

1. As plaintiffs, The Delaware Railroad Construction Company, citizens of Iowa.

2. As defendants, Meyer, a citizen of New York, and Dennison, a citizen of Ohio; or if Meyer be not regarded as then in the cause, then Dennison alone.

And it is equally clear that there was at that time pending *one controversy and one only*, viz., whether the plaintiff's claim which by *a final and conclusive judgment, rendered more than a year previously*, and never disturbed or sought to be disturbed by any one, had been established as a debt against the Davenport & St. Paul Railroad Company, and a lien on their interest in the property in question, was or was not a paramount lien upon the mortgaged interest on that property held by Meyer and Dennison as Trustees.

That both these points of fact are as stated above, appears to us to be too absolutely clear to admit of discussion.

Whatever *apparent confusion* exists in this respect upon a mere cursory inspection of the record, is consequent upon the circumstances that in some of the papers and proceedings, there had been a careless and inappropriate continued use of the names of certain *former* parties, who had entirely ceased to be parties because of the case as to them being completely terminated.

But it is entirely clear that no such careless entitling of papers can make one a party who was not so in fact.

Let us then carefully examine this question of fact.

The parties *originally named* as defendants in the transcript of the list, January 15th, 1874, *Record* 130, *page* 1, were:

1. The Davenport & St. Paul Railroad Company.
2. John Edgar Thomson and William Dennison, Trustees for certain bondholders of said railroad.
3. Davenport Railroad Construction Company.
4. Lucius Howard.

As to all these parties except the mortgage Trustees, the

suit had been completely terminated long before May, 1875, as follows:

The plaintiffs before serving any of the other defendants, all being returned as not found (*page* 30), elected to *sever* the suit, and go on in the first instance *against the railroad company alone.* Accordingly, as to those parties there was a trial before a Referee (*pages* 33 *to* 38), and on 6 February, 1874, there was rendered a complete and final judgment (*pages* 39 *and* 40, *of record* 30), establishing the plaintiffs debt and its amount, and establishing it as a lien upon the described property *of the defendants*, viz., the Delaware section of the railroad, and ordering *a special execution for its sale*, and *continuing* the cause as to all the defendants except said Davenport & St. Paul Railroad Company.

Thus as to the railroad company, the cause was *ended* by final judgment, on February 6, 1874.

And it is *solely* on this *final* judgment, the execution issued upon it February 17, the Sheriff's levy upon the road "as the property of the Davenport & St. Paul Railway Company," and the Sheriff's sale thereunder on May 4, 1874, that the present claim of title to this railroad is founded.

How it can be said that after this final judgment, followed by execution and sale the cause *remained pending* against the railroad company, passes our comprehension.

It is to be observed that the final judgment embraced *every thing as against the railroad company*, which *was or ever had been* embraced in the case. That judgment continued the case as to *all the defendants except* the Davenport & St. Paul Railway Company. As to that company it was not continued but *ended.*

As to them there was *nothing to continue.* Whatever might be the result of the litigation as to the *remaining* defendants, upon the litigation continued as to them, it would not *enlarge, diminish, nor in any way vary* the judgment as finally rendered against them.

It is to be assumed, and we suppose it to be true in fact, that the course pursued by the plaintiff, of severing the suit, getting judgment against one defendant and going on with the

suit separately against the other defendants was regular by the laws and practice of Iowa.

Its regularity so far as respects the railroad company, has not been and probably could not be questioned by any one. At all events, the plaintiffs having taken that course, and now basing their claim of title to the road solely upon it, they cannot question it.

The defendants, other than the railroad company, had been made parties to the suit simply as having liens upon the property to which the plaintiffs alleged their lien to be paramount. (Record, No. 30, p. 13.)

The remaining defendants, other than the mortgage Tustees, had been completely disposed of long before the filing of the removal papers.

On April 7th, 1874, the plaintiffs filed a *supplemental* petition (*Record No.* 30, *page* 46), setting forth the decree against the railroad company, and praying that the lien be established against the *remaining* defendants, and declared paramount to their claims, and that they might be foreclosed of all right of redemption.

The summons or notice on this petition was personally served on 10th of April, 1874, on the Davenport Railway Construction Company, *page* 48, and they suffered a default. On 22d May, 1874, the plaintiffs voluntarily dismissed their petition as to Howard, and took judgment against the Davenport Railway Construction Company, upon their default, after personal service, establishing their lien as paramount, and foreclosing them, which decree was never afterwards moved against but remained in force.

Thus, by May 22, 1874, Howard and the Davenport Railway Construction Company were out of the case, which, as to them, was completely and finally ended.

On the same 22d May, 1874, the plaintiffs took a similar judgment by default against Thomson and Dennison, Trustees, establishing the mechanics lien as paramount to theirs, and foreclosing them (*page* 49 *of Record No.* 30).

But this judgment being obtained without any personal service or notice, but merely upon publication for four weeks between 9th and 30th April (*page* 44 *of Record, No.* 30), was not conclusive, but subject under the laws of Iowa to be opened by the defendants for a new trial, as of course as matter of right, at any time within two years.

Thomson died May 23, 1874, and on January 26, 1875, Dennison, as surviving Trustee, exercised his statutory right to open the judgment by default and have a new trial (*pages* 49, 50, *and* 51), which was accorded to him by order of the court on January 26, 1875, and for the purpose of such trial taking place the case was continued to the next term, May, 1875.

The mortgage to Thomson and Dennison, Trustees, provided (*page* 30 *of Record No.* 29) that in case of death of either of the Trustees, the vacancy might be filled by a majority in interest of the bondholders, by instrument in writing. On *pages* 9, 10, 11 *of Record No.* 29 will be found the written instruments, executed in Europe by the requisite amount of bondholders, viz., to the aggregate amount of $1,975,000, in December, 1874 and January, 1875, appointing Meyer Trustee in place of Thomson, deceased, and Meyer's acceptance of same on 12th March, 1875.

On May 19, 1875, Meyer, having previously as such been substituted, intervened in the foreclosure suit upon the mortgage to Thomson and Dennison, Trustees, previously instituted in the United States Circuit Court, by Moses DeWitt Loomis, a bondholder, and filed a cross bill in that suit for foreclosure of the mortgage (*Record, No.* 209, *pages* 1 *to* 43, *inclusive, including cross-bill and exhibits annexed*), filed his petition in the suit pending in favor of the Delaware Railroad Construction Company for enforcement of the alleged mechanics lien, asking to be made a co-defendant with Dennison in that suit. (*Record No.* 30, *page* 54 *and* 55.)

Such was the posture of the suit when the petition and bond for removal, which are now in question, were filed (*pages* 55-6 *of Record No.* 30), no order having been as yet made upon the petition of Meyer, to be united as a party, and upon review of the unquestionable facts above stated, it will be seen,

That as to *all* the parties who had been *originally* named as defendants, except Thomson and Dennison, Trustees, the case

had been long before *finally and completely disposed of*, so that they were no longer *parties to any pending* suit or controversy.

As to Howard and the Davenport Construction Company, this will not, of course, be questioned.

And there is no better ground really, for questioning it, as to the Davenport & St. Paul Railway Company.

We have above clearly shown that, as to them, there was a final and complete judgment, with nothing to be recovered, and no reservation made, or attempted to be made, either in form or in fact.

The only *suit* or proceeding which was then *pending*, was that in favor of the Construction Company, *against the Trustees of the mortgage*, to have the alleged mechanics lien adjudged paramount to the mortgage title, and *whether it was so paramount or not*, was the only controversy then pending undetermined.

The existence of the debt as against the railroad company was established conclusively and beyond the reach of further litigation, and the existence of the lien for such debt as against all their interest in the property was established with equal finality and conclusiveness; moreover, all their interest in the property had finally and conclusively passed away from them and to the lien claimants, in virtue of the Sheriff's sale, already past redemption.

It is argued by our adversaries that there could be no establishment of the mechanics lien as against the mortgagees, without its being primarily established against the mortgagors, and that therefore the mortgagors were indispensable parties against the mortgagees for its establishment.

If it were true that the mortgagors were such necessary parties, it would not help our adversaries' position to show that they were necessary parties to the pending suit, if in fact they were not such present parties, and we have already shown that they were not in fact present parties, but that the suit had been finally *ended* as against them, and *continued* only as against the other parties, *excepting them*.

But it is an entire mistake to say that at that time or under the then circumstances they were either necessary or proper parties to the suit against the mortgagees. If the debt and lien *had not been previously established* as against the mortgagors,

it would doubtless have been proper that they should have been parties to the suit for its establishment against the mortgagees.

But as it had been already so established conclusively, and as moreover all the mortgagors' interest in this property in question had completely passed away from them, there was nothing remaining to be determined as against the mortgagees, and the latter had no interest whatever in the pending question as between the lien claimant and the mortgagee.

However that question might be determined would in nowise affect the position of the mortgagors. If determined against the mortgagees, it would neither add to or diminish the existing obligation of the mortgagors under the final judgment long before rendered.

If determined in favor of the mortgagees, the existing position of the mortgagors would in like manner remain totally unchanged.

In short, the mortgagors were wholly outside of and indifferent to the only controversy which in May, 1875, was pending in the suit in question.

And when we test this assertion, by referring to the actual result of the trial in the State Court, after the latter refused to recognize the removal, and insisted upon proceeding to trial of the then pending suit, we find a practical verification of our position.

When the State Court decided the question at issue in the plaintiff's favor, there was no additional or varied judgment as against the railroad company. That remained untouched and unaffected. The decision and judgment merely gave to the plaintiffs, in addition to what they already held, as against the mortgagors, the title of the mortgagees.

If the decision upon the contested party had been the other way, there would have been a like maintenance, unvaried of what they held under the subsisting judgment against the mortgagors, just as it was, *without* the addition of the mortgagees' title.

The case is almost, if not quite, directly analagous to the one quite common in practice, if a mortgage foreclosure having taken place against the mortgagor, and perhaps some subsequent incumbrances, where some person having a subsisting lien, and therefore an "equity of redemption" has been,

through mistake or otherwise, left out of the foreclosure; and it is therefore desired to perfect the title by foreclosing as against him.

In such cases the *correct and universal practice is*, to file a bill merely against the previously omitted party who has a subsisting equity of redemption, *without adding any party whose right has been already foreclosed*, and in a suit thus brought there is rendered a decree, either for a resale, with proper provisions in case of any surplus being raised by it, or the ancient decree of strict foreclosure, barring the equity of redemption of the party made sole defendant in the suit, unless he shall redeem within the time fixed by the decree for the purpose.

We venture to say that no correct equity practitioner ever made, or thought of making parties defendant in such a suit those whose rights had been completely cut off by the previous foreclosure.

The argument of our adversaries also asserts that the Daveport & St. Paul Railroad Company was a necessary party to the pending suit of the lien claimants against the mortgagees, because they say that the determination of the disputed question as between the lien claimants and the mortgagees necessarily involved the determination of the validity of the mortgagees' mortgage, as between them and the mortgagors, and that this could not be done without having the mortgagors as a party before the court.

But here again the argument of our adversaries completely mistakes the nature and position of the case and the controversy.

Whatever might be the decision of the case which was claimed to be removed, there was to be no judgment whatever rendered in that suit for the enforcement of that mortgage, or any provision in it, in favor of the mortgagees against the mortgagor.

If, upon the question at issue between the lien claimants and the mortgagee, there were a decision in favor of the mortgagee, the only judgment consequent upon it would be that the lien claimants lien was subordinate instead of paramount to the rights, whatever they were, of the mortgagees against the mortgagor, and consequently dismissing the lien claimants suit against the mortgagees upon the mortgagors, upon

the merits and there stopping, leaving the mortgagees free to assert such rights, whatever they might be, as against the martgagors, in such appropriate suit as they might see fit to bring for the purpose, or, in this particular case, in the foreclosure suit already pending in the United States Circuit Court (No. 29).

Certainly no such rights ever were sought to be or ever properly could have been asserted and enforced as against the mortgagor in the mechanics lien suit. That it might be requisite in that suit to enquire *collaterally* into the nature or extent of such rights, certainly could never have made it necessary to make the mortgagor a party to such suit.

And moreover, the original report in the mechanics lien suit does not question but expressly admits the existence of the mortgage as between the mortgagor and mortgagee, questioning only its priority over the plaintiffs.

The allegation is (*Record*, 30, *page* 13), that "*John Edgar Thomson and William Dennison, Trustees for certain bondholders of said railroad*," and certain other defendants there named, "*have liens upon said property*," but that the plaintiffs' lien is paramount.

And even if the cause sought to be removed, besides the controversy between the removing defendants and the plaintiffs—had likewise embraced a controversy between the removing defendants and the railroad company, that could not, under *any* construction of the statute, raise any jurisdictional difficulty, or constitute any objection to the removal, inasmuch as *that also* would be a controversy between citizens of different States. As soon as it is ascertained, as it clearly is here, that when the cause is sought to be removed, it does not embrace *any pending controversy* between citizens of the same State, there ceases to be room for debate as to any jurisdictional difficulty.

Take the case of a bill of interpleader, in which there has been rendered the customary decree discharging the stakeholder, complainant with his costs, and directing the defendants, rival claimants to the fund, to interplead touching their respective claims, and *they*, the parties to the actually pending

controversy, are citizens of different States, while the original complainant, who, by the interlocutory decree, has been discharged out of the suit, *although his name continues to be used in the entitling of the cause*, is a citizen of the same State with one of the defendants; could anyone doubt that a suit and controversy thus situated would be removable under the Act of 1875?

In such a case the name of the discharged stakeholder is always continued to be used in the entitling of the papers. But he is a nominal and not a real party. His death would not abate the suit, nor require to have any notice taken of it. His name would continue to be used in the entitling of the papers, though he might have been in his grave for years.

If, after the decree of February 6th, 1874, finally ending the cause and controversy, so far as it really concerned the Davenport & St. Paul Railroad Company, that company could properly be considered as remaining nominally a party to this suit, so as to make it proper to continue the use of its name in the entitling (which we think is *not* the case), it was certainly a nominal and not a real or substantial party. Its position was substantially analogous to that of the stakeholder complainant in an interpleader suit after the decree discharging him. Its legal dissolution, equivalent to death of a natural person, would not have caused any abatement, nor required to be taken notice of, in the continuance of the controversy between the lien claimants and the mortgagees. Certainly, if there had been a natural person in precisely like attitude towards the real contestants in the remaining controversy his death would not have required to be noticed, nor would it have been necessary or at all proper to bring in his personal representative.

But it seems to us, that after the decree of February 6, 1874, the railroad company did not remain as even a nominal party. The suit was *severed*. The case really analogous to it is that of a suit brought against the maker and endorser of a note, where by statute (as in New York) it is permitted to join them as defendants, though their contracts are several and independent, and to sever and take judgment separately against one, whenever the plaintiff would have been entitled to judgment if the other had not been joined.

Be this as it may, it is beyond dispute, that if the railroad company remained a formal party to the suit, after the judgment of February 6, 1874, it was *merely a formal and nominal party*, and it has long been settled, even under the statutes which require that *all* the parties on one side of a suit must be of different citizenship from all and each of the parties on the other; that identity of citizenship of such merely formal and nominal parties creates no jurisdictional difficulty.

We trust we have now shown to the satisfaction of the court, that in respect of parties and status of the controvery, there was here an unquestionable right of removal, under the Act of 1875, upon any possible construction of that statute, and that none of the delicate or difficult questions of construction presented by it really arise in this case.

Was the Removal Applied for in time?

The question was the removal in time, has two branches.

1. Was it at the term at which the case could be first tried?
2. Was it before the actual trial?

Upon the first question our points are:

1. The purpose of this requirement is merely to require *diligence;* the act distinctly gives the right in cases then pending, and should not be to construed as to defeat it where all possible diligence has been used. The removal was at the first Term after passage of the act, and that was sufficient. The argument and authorities as to this have been so fully presented that we will not repeat.

2. The point of our adversaries that the Term at which judgment by default was taken against absentee defendants, upon publication merely without any actual notice of the suit, was the Term at which the cause was triable, and at which removal should have been applied for on pain of losing the right to it, as likewise the point that this judgment by default against an

absentee was a trial of the cause so as to be an absolute bar to removal, appear to us to be so frivolous, that we know not how to reply to them.

3. The January Term, at which Dennison for the first time came in, and took an order opening the default and directing a trial to be had, was not the "Term at which the cause could be tried" within the meaning of the act.

The Term referred to by the act is the Term at which, according to the practice of the court, the case would "stand for trial," and be, in fact, tried, unless postponed.

It has been elsewhere shown in our brief that by the statutes of Iowa the Trial Term is *not* the appearance Term, but the *Term succeeding* the appearance Term, and that the attempt to make mechanics lien cases an exception to this *general rule* has been held by the courts of Iowa to be an infraction of the Constitution of the State; so that if we treat the January Term at which Dennison appeared as the appearance Term, the next succeeding May Term would be the regular Trial Term for the case.

And in conformity with this was the actual disposition of the case by the court. *The same order* (*Record* 30, *pages* 51 *and* 52) which opened the default, and ordered the trial demanded by Dennison under his statutory right, continued the case to the May Term, to the end that such trial might then be had.

It does not at all appear, and there is nothing to indicate, and certainly will not be presented (to the *unreasonable end* of defeating this removal because of *impossible* diligence), that this order, made simultaneously with the admission of Dennison to defend, by which the case was continued to the May Term for trial, was a postponement of a trial which, in due course, should have been had at the January Term. On the contrary, it would appear, and must be presumed, to have been an order made in ordinary course, setting the case for trial at the proper and usual Trial Term.

It is clear that this cause *never* did, even for an instant, "stand for trial" at the January term; inasmuch as the *same* order which directed that *there should be a trial at all*, set it for the May Term.

It is submitted as the proper construction of this act that the "Term at which the cause could be first tried" means, that Term at which, *after the issues are completely joined*, the case stands regularly for trial, *i. e.*, awaiting trial upon being reached in its order, and at which it would or could accordingly have been tried, unless the trial were *postponed* upon application.

This design of this clause was simply to prevent a party from obtaining at one Trial Term a postponement of the trial to another Term, and at such other Term, causing further delay by a removal.

In this case there is no pretence for alleging against the removing party any delay, postponement or lack of possible diligence.

The issues were not even completely joined until the May Term. On *May* 21, 1875, the plaintiffs *filed their replication* (page 63, Record 30).

It cannot be denied that any holding that the May Term, 1875, was too late for the removal of this case, is simply denying to the defendants any right of removal at all, under the Act of March 3, 1875, and we take it for granted that the court will not yield to the demand of our adversaries that they shall make intendments or resort to strained technicalities, for the purpose of defeating the right of removing this then pending suit, which it was the purpose of the Act of 1875 to give to parties situated as these parties were.

If there were otherwise needed any evidence of the propriety of giving to that statute such liberality of construction as is customary given to a statute of remedial and beneficial nature, we should find it in the flagrantly wrong disposition of this case made by this State court in favor of their own citizens and against citizens of other States and aliens, after undertaking upon highly strained grounds of technicality to defeat the removal of the controversy to the Federal jurisdiction. We refer to the decree by which the State court undertook to confiscate the property of the mortgagees for a debt of one-sixth its amount, without affording any opportunity whatever for discharging the lien by payment of the debt.

The assertion of our adversaries that the removal was not "before the trial" appears to us to be manifestly baseless.

The case of Yulee *v.* Vose, Oct. T., 1878, has settled that in order to bar removal on this ground, there must be a real and substantial, and not merely a formal or nominal beginning of the trial. The statute is, that the removal shall be "before the trial;" it does not distinctly say that it shall be before the trial is commenced, and it might, perhaps, be urged that there has not been a trial until the trial is ended; but we agree that it would be reasonable to hold that a party shall not be permitted to enter upon the trial with its chances, and then during its progress, when he imagines it is going against him, remove the case to another jurisdiction.

Certainly there was nothing of that sort here.

The *decisive step* of filing the removal papers, was taken *the day before* that took place, which is claimed to have been the commencement of the trial. It is plain that the counsel for Meyer and Dennison, having a foreshadowing of things to come, was all the while trying to get out of the State Court, and the other side trying to prevent him.

The answer to statement of proceedings on this behalf, as finally settled by the State Court Judge, will be found on page 112–113 of Record 30.

It there appears while the defendants' counsel was making motions in the cause, which certainly were no part of, but were preliminary to, a trial, and *immediately* after the calling up and disposition of the motion to admit Meyer as a defendant, which was naturally regarded as incidental to and a *perfecting of the record for removal*, inasmuch as *Meyer had joined in the removal papers*, the plaintiffs' counsel *undertook* to *interject* into the case, the trial not being *as yet commenced*, and doubtless with a view to preclude removal, an *offer*, as in evidence of the contract sued on.

It is not stated that this offer was received in evidence, nor that it was objected to, nor that anything was done about it; but *immediately* upon the plaintiffs' counsel *offering* or proposing to take a step which assumed that the trial was to go on in that court, the defendant's counsel called the court's attention to the removal papers *then already on file*, and asked that he might be allowed to make any amendment of them

which might be deemed requisite or proper by reason of the unexpected refusal of the court to allow Meyer to be treated as a defendant.

Nothing can be further than this from an actual commencement of the trial in the State Court. Surely this court will not permit the plaintiffs' counsel to destroy the right of removal by such a trick as this, *i. e.*, jumping up, instanter upon disposition of a motion confessedly anterior to any trial, and by making an offer which assumed that the trial was then and there to go on thereby, of *his own head, and without any order of the court*, actually commence it, and so *in a second*, bar the right of removal, before the plaintiffs counsel could take breath for bringing on his removal motion, after disposition of his motion to admit Meyer who had joined in the removal papers.

If such a trick as this were to be permitted to accomplish its purpose, nimbleness and slight-of-hand would seem to be of more value to a lawyer than legal skill and knowledge, and proper decorum and lawyer-like proceeding.

The pretence that the offering of this contract in evidence was a necessary, or at all a *bona fide* part of a trial of the controversy between those parties, is evidently baseless; and the assertion of the argument of our adversaries that the presentation of this contract was so alarming a circumstance to the defendants as to scare them out of the State Court and lead them to take refuge in the Federal jurisdiction, is really too absurd.

The existence of this contract was *not at all in issue.* A copy of it was set out at large in a schedule annexed to the complaint, and the defendants' answer not only admitted it, but the defence was mainly based upon one of its provisions.

We quote from Dennison's amended answer, *pages* 53, '4, *Record* 30:

"And this defendant says that said Delaware Railroad Con-
"struction Company performed the work, furnished the mate-
"rials and makes the claim of lien against said company and
"said Trustees by reason of a written contract set out in the
"petition filed in said cause, to which agreement reference is
"hereby made, and by the said contract the said Construction
"Company agreed, &c., &c." (setting up the defence arising under a particular provision of the contract).

We thus see how much of *bona fides* there was in the pretended offer of this contract in evidence, as a commencement of the trial.

But further, we find that when this pretended commencement of the trial took place the cause was *not yet completely at issue*, nor ready for trial.

Upon further examining the State Judge's amended record or statement of facts in *Record No.* 30, *pages* 112 *and* 113, we find *after* the entry on page 112, a statement on page 113, that on the next day, May 22, the plaintiff asked leave to file a reply, which was granted to him, and he filed it accordingly, and then Dennison asked and obtained leave to amend his answer, and did so, and *thereupon*, the issues being then doubtful, completely joined the record states: "And the court *now proceeds with the trial of said cause on the issues joined therein.*" This action on 22d May, was the actual commencement of the trial. Whatever took place previously was preliminary to or by way of preparation for trial—certainly as much of that nature as calling the cause and swearing the jury in Yule *v.* Vose, which the court held not to bar the right of removal.

Moreover, if anything which took place previously could possibly be regarded as commencement of *a* trial (as we think it clearly could not), it must have been part of a *then intended* trial of the then issues, and when subsequently, the plaintiffs finding they could not safely go on upon the old issues, because they had failed to file a reply, sought and obtained the privilege of completing the issues by filing reply, they thereby voluntarily abandoned the old steps towards trying the old issues, and took a new departure, and after completing the new issues, commenced a trial of them, so that of the actual trial, the partial steps under the abandoned issues formed no part.

The Form of the Petition and Bond.

We come now to the objections raised against the *form* of the petition and bond.

We agree that there must be a petition in writing. As the statute requires it to be *made and filed*, an oral petition or mo-

tion will not answer, and there must be a bond with surety as prescribed.

Here certainly there was a petition in writing. It is objected that it was not signed nor sworn to.

As to an oath, the statute does not require it, nor does it (in terms certainly) require "signing."

This paper was not "subscribed," or signed at the end—and clearly there was nothing in the statute requiring that it shoud be.

It was signed. By the decisions of Iowa, cited in the brief of our associate, as well as by the familiar principles of the common law, a paper is "signed" by a party if his name is used in its body, by himself, or by any one representing him whose signature on his behalf, would, if written at the foot, be adequate.

Testing it by this rule, this petition is signed. The object of the signature is to authenticate it as the act of the party. No question was made at the time, nor is or can be any made now as to its authenticity. It was presented to the court by his authorized representative, who was an officer of the court, and at the time *recognized as authentic*, by both the court and the opposite party, their objections being placed upon *other* grounds.

Moreover, by the express decision of the court in Yulee *v.* Vose, *the removal papers are to be taken together and in connection with the other papers then before the court in the cause.*

In the opinion of the court in that case as delivered by the Chief Justice, it is said:

"The petition and the affidavits which accompan'ed it, "are to be taken together as part of the same instrument. "They are also to be considered in connection with the other "parts of the record to which they belong."

It is important to keep in mind this principle, and its application will, we think, easily dispose of all the formal objections which are raised against these removal papers, if otherwise they should be deemed at all embarrasing, which we think is not the case.

The bond, which accompanies the petition, and recites it,

is signed by the petitioners, and thus, if not otherwise, the petition is sufficiently authenticated.

As to the being sworn to. The argument of our adversaries concedes that if the removal is sought on the ground of different citizenship, it need not be sworn to.

The removal was sought and is now maintained on that ground, and that only, and indisputably it states all the facts essential to a removal on that ground. True, it contains a statement under the "prejudice and local influence" statute, but as that act plainly requires an affidavit of such prejudice and local influence as a condition of removal under it ; and there was no such affidavit, it is plain that this clause of the petition is mere surplusage.

The extraordinary argument of our adversaries, on this head, viz., that the prejudice and local influence clause of the petition is necessarily inoperative, because of their being no affidavit, and yet that it vitiates the petition which is complete and sufficient on the ground of different citizenship, or renders it necessary that that part of the petition should be sworn to, though it would not otherwise be requisite, does not seem to us to call for an answer.

There is no pretence that *in fact*, the difference in citizenship did not exist; it *already* substantially appeared upon the records of the court (independently of the petition) by the affidavit of non-residence under which publication had been ordered; true, that affidavit did not take note of the strictly technical difference between citizenship and residence, but the petition did technically aver the citizenship, and if it could be considered proper for the State Court, before obeying the injunction of the statute to proceed no further with the cause, to enquire into the substantial truth of this statement of the petition, it certainly was not needful that they should be presented in the first instance, with evidence preserving this refined technical distinction between residence and citizenship, when the plaintiffs had already placed upon the record sworn evidence of the residence, and no one called attention to this technical distinction.

But beyond this, it is clear that as the statute *does not call for* an affidavit of the different citizenship, if the court or the opposite party could in any case call for and demand it before stopping proceedings in the State Court, their right to do so

may be waived, it not being a jurisdictional point, and in this case it was certainly waived, not only by not calling for it, but by taking action which recognized it as an existing fact, by *placing the objection* to the removal *distinctly upon other grounds.*

And here we should state one principle which we conceive to be applicable to all the questions now attempted to be made as to the form of these removal papers.

We trust we have shown that when the defendants' counsel presented the removal papers and requested the court to recognize the removal and proceed no further in the cause, there was a clear subsisting right of removal, and the defendants were in time for its execreise. It was during the term, at any time within which removal was permissible, and there had been as yet no trial. If there was any defect in the papers as then presented, the defendants had the right and opportunity to correct such defect.

If the plaintiffs had then chosen simply to object to or disregard the removal, without assigning any reasons, the defendants might perhaps have been bound at their peril to find out for themselves and adequately correct any material defects which might exist in the papers.

But the plaintiffs did not choose to take this course. They elected to state their objections to the removal, and on these objections, and without stating or even hinting at any other, the court decided against the right to remove.

These objections appear in the record, *page* 112 *of Record*, 30, as follows:

" Plaintiff, by its attorney, objects that the bond is insuf-
" ficient, one surety being an attorney, and not eligible as a
" surety on a bond in court under the law; and further, that
" the application to transfer this cause is too late, the cause
" being now reached for trial, and the trial of the cause com-
" menced. Whereupon the court sustains the objections of
" plaintiffs in this behalf, to which ruling of the court the de-
" fendant, William Dennison, Trustee, by his counsel excepts,
" and asks that his excepting be made a matter of record,
" which is accordingly done. When pending further proceed-
" ings in said cause, the court adjourned to May 22, 1875.

"And now on this 22d day of May, 1875, it being one of the "regular May Terms, 1875, of said court, the court proceeds "with the further hearing of said cause, whereupon defendant "Dennison, Trustee, now moves the court to proceed no fur- "ther with the trial of said cause, and asks that said defend- "ant be allowed to file a new bond for the transfer of said "cause to United States Circuit Court, or to deposit money "for costs of same. Plaintiff objects, that the cause is now "on trial on its merits. Objection sustained, and said de- "fendant, by his counsel, excepts, and asks that his exception "be made a matter of record, which is accordingly done. "Whereupon plaintiff, by his counsel, asks leave to file a "reply," &c., &c.

Those are the objections which the plaintiff chose to state against the removal, and *all* the objections. At a previous stage (*see page* 112) "the defendant William Dennison, Trustee, asks leave to file an amended petition and bond," which was objected to, upon the grounds above stated, and refused by the court.

Under this state of facts, we insist, with confidence, inasmuch as when the objections were stated, the defendants were in such position as that they could effectually cure any defects of form (there having been, in fact, no commencement of the trial within the rule laid down by this court in *Yulee* v. *Vose*), that in respect of all defects of form in the papers, which might then have been cured upon their being pointed out (with exception, perhaps of such *vital jurisdictional defects* as would render the removal papers void, if there had been any such, as certainly there was not), such unstated defects were *waived* by the plaintiff, by omitting to state them, and *placing the objection upon other grounds.* Every defect which might have been waived in express terms, *i. e.*, everything other than vital jurisdictional defects rendering the removal papers *absolutely void*, was thus waived by implication, as fully as it could have been waived expressly.

We suppose this necessarily follows from the application of a well established general principle—that which is applied upon many exceptions taken at a trial, in respect of preliminary proofs under insurance policies, in cases of tender, and in

an immense variety of instances which certainly need not be mentioned for illustration of a general principle so familiar.

The objections which were thus made and sustained were but two:

1. Alleged point of insufficiency in the bond.

2. Attempt at removal too late.

The latter we have fully discussed and need not repeat.

As to the former, we say:

1. The objection taken to the bond was untenable.

The statute of Iowa forbidding its attorneys to become sureties, had no application to United States Court proceedings. It did not and could not prescribe any arbitrary qualification for a suretyship prescribed by Act of Congress, beyond or in addition to that prescribed by Congress, which was merely that the surety should be "sufficient." Under this, the State statutes could no more prescribe that the surety should not be an attorney, if he were intrinsically "sufficient," than they could prescribe that *necessarily he should be* an attorney, or a merchant, or a doctor, or a member of any other designated class of community.

But it needs not to discuss the limits of State power of interference in this behalf.

The State *did not in fact undertake* to make any regulation of bonds required under United States law. Their statute had no application whatever. And even in cases where the State statute applied, although the statute forbade attorneys to become sureties, it merely made that *a good ground of exception to a suretyship*, to be taken in its court proceedings, but, certainly did not at all invalidate a bond actually signed by an attorney.

But there is this further and conclusive answer to the objection taken to the bond, viz.:

On the bond there were *two* sureties. There is nothing in the Act of Congress requiring more than one. The words are good and sufficient surety." If we regard the one surety, who is alleged to have been an attorney (of which fact, by the way, there

was no evidence whatever) as so disqualified as to make his signature worthless, there remains the other surety, who must be presumed to have been of adequate pecuniary responsibility, there being no proof, nor even an allegation to the contrary.

Thus, all the objections taken at the time against these proceedings, are shown to be untenable.

Moreover, the defendant proposed to amend petition and bond, and it must be presumed he would thus have cured all possible defects or inaccacuracies, if allowed to do so, but he was refused permission on the *untenable* ground that it was *too late*. After this refusal, no *curable* defects of form can now be set up to bar his right to the removal.

We will, however, briefly advert to certain other alleged defects of form in the petition and bond, which are now attempted to be set up and taken advantage of.

It is said that in the petition and bond, Meyer is named as one of the removing parties, together with Dennison, and it is claimed that by reason of the State Court's refusal to admit him as a party, in pursuance of his petition, he was no proper party to the removal by Dennison, and that the improper uniting of him with Dennison the proper party, *vitiates* the legitimate action of Dennison.

Surely no such position can be maintained. If it was not proper to name Meyer, the naming him was merely *surplusage*.

It cannot annul Dennison's petition, which was in itself full, complete and sufficient.

We have seen how Meyer come to be united.

It was upon the supposition that the court would accede to his petition to be made a party, as clearly they ought to have done. If the denial of that application is to be assumed as having the legal effect to keep Meyer *out* of the case notwithstanding his clear right to be *in*, the uniting him in the removal papers was an *incongruity* or at the utmost an *irregularity* which it would have been proper enough to correct, as Dennison's attorney asked leave to do, but was improperly refused; but certainly it *did not nullify* Dennison's petition, nor create any *jurisdictional defect*.

The point now alleged that the suit was *misdescribed* in the petition and bond, is merely an amplification of the one just discussed, and subject to the same complete answer.

The improper naming of Meyer as a party, whether incongruous or not, did not create any doubt as to what suit was *intended* to be, *and therefore in legal effect was*, referred to by the petition and bond.

There was but one suit to which they could possible have been intended to refer, and it was *this* suit. It is manifest that it was *so understood and recognized* at the time, by both the plaintiff's counsel and the court, the objections to the removal stated by the counsel, and the disposition of such objections by the court clearly proceeding on that basis; it surely could not be permitted to the plaintiff's, at a long subsequent day, and when it had become too late to correct the mistakes if it was deemed to be of any consequence, to set up, for the first time, such an objection, that is forbidden by the principle before adverted to.

An inspection of the papers, then filed, sufficiently explained the incongruity, and showed how Meyer's name had come in; he was named on the *removal bond* as "*Lewis H. Meyer, Trustee, successor to John Edgar Thomson,*" and taking together all the papers before the court, as this court, in Yulee *as.* Vose, held must be done, all possibility of mistake as to the cause intended to be referred to by the removal papers is obviated.

Moreover, it appears to us that the stipulation entered into by the plaintiffs in relation to Meyer, after the cause was brought into the Federal Court, and under which it was tried there, *precludes* the plaintiff's *from this particular objection* if they were not otherwise precluded; this stipulation will be found on *page* 114, *record No.* 210.

Alleged waiver of right of removal.

It remains to consider the proposition advanced by our adversaries, that assuming the removal to have been once legally effected, it was *waived*, by action subsequently taken in the State Court by the removing defendants.

It does not seem to us that this is worthy of serious discussion.

It has been long since decided, in numerous cases, some of which have been cited in our briefs, that if a party entitled to remove exercises such right of presenting the necessary papers to the State Court, the case is *ipso facto* removed, and the *jurisdiction of the State Court gone*, whether that court yields its assent to the removal or not.

That if it insists on proceeding, in violation of the act of Congress, its action is *void*; that the removing defendant, having legally transferred the cause, does *not* lose or jeopardize his right thus acquired, by subsequently appearing and defending against the wrongful proceedings in the State Court, but may do so, if he chooses, though he is not bound to do it in order to preserve his right to treat such action as *void*. Everything he thus does in the State Court, while attempting to *ward off* its wrongful action, is regarded as done under *legal duress*.

If a question of *waiver* can ever arise, because of such subsequent conduct in the State Court, it can only be where the action is such as to *indicate* an actual *intention*, as matter of fact, to *abandon* the removal proceeding and *submit* to the retention of the case by the State Court.

There is certainly no pretence for claiming that there was any such abandonment or submission here. On the contrary, there were the clearest possible indications to the contrary.

On *page* 112, *record* 30, it appears that on the refusal of the court on May 21, to permit or recognize the transfer, "the defendant William Dennison, Trustee, by his counsel *excepts and asks that his exceptions be made a matter of record, which is accordingly done.*"

Again, on the next day, *page* 113, *record* 30, Dennison moves the court to proceed no further, and upon ruling against him he again "*excepts and asks that his exception be made a matter of record, which is accordingly done.*"

And on the same, 22d of May, Meyer and Dennison filed *a full and formal protest verified by oath*, reciting the facts in relation to the removal and refusal of the court to recognize the removal thus legally accomplished, and *protesting* against the action of the State Court in further proceeding. This paper is found on *pages* 63 *and* 64 *of record No.* 30.

Now, clearly, whatever was subsequently done by Dennison in the State Court was *under these protests*, and with all the reservations of rights which could arise from them.

It is stated that some *waiver* arose, by reason of the action in the State Court after the papers was filed in the clerk's office, and before they were called to the attention of the court on May 21, and the court asked to recognize and give effect to them.

It is plain that whatever was done in this interval was not by way of going on with the case in the State Court, but to the end of getting the record in the proper formal shape for the removal, and the presentation of the papers on May 21 to the court, and claiming then the transfer under them, nullified any possible implication of *waiver* from any *previous* act, and amounted in legal effect to *re-filing* or *re-presentation* of the papers at the latter time, if that were at all needful.

And so of the re-presentation, and demand that the court should proceed no further, made on the following day.

Then, great importance is claimed to be attached to the entry made in the State Judge's record of his proceedings, *page* 113, *record* 30, that when on the 22d May, he had insisted on proceeding to try the cause, notwithstanding Dennison's claim that it was transferred to the Federal Court, and in the face of his repeated protests, that the case "is duly submitted to the court, and by *consent of parties* the court *takes the same under advisement*, with the *understanding* that judgement shall be rendered by the court in vacation, and entered as of the last day of this Term."

This occurrence, be it remembered, was *on the very day* on which Dennison's counsel had made his objection to the court's *proceeding at all*, upon the ground that the case was legally removed, and taken an exception on that ground, and taken care to have it formally entered on the record, and had likewise filed the very full and formal protest upon oath, to which we have above called attention, and this verbal understanding recited in the State Judge's entry, was unquestionably made *subject to the exceptions and protest*. Plainly, the thing assented to was simply this: that inasmuch as the State Judge had insisted on going on with the trial, he might, instead of

rendering his decision then and there, take the matter under advisement, and that his decision, when made up and rendered in vacation, should have *precisely the like effect* as if rendered at the close of the trial—*and, of course, no greater or other effect.* To give to this act of courtesy of counsel, for the judge's convenience, the effect now claimed for it, would be an utter perversion of what was intended, and might fairly be designated as mere trickery.

When a State Court is insisting on proceeding with a cause which is claimed to be removed, against the protest of the removing party; and that party, under such legal duress and subject to the protest, is appearing and trying to defend himself against, or to ward off the attack, it being well settled and familiar a law, that his so doing, and his taking part in the trial itself, is no waiver of his rights in respect of the removal; all *incidental* acts of this general nature, such as arrangements as to forms and course of procedure, motions for or consents to adjournments, &c., &c., stand upon like general principles as the more important act of taking part in the trial itself, and are equally *without prejudice.* They are all regarded as *acts under duress and subject to protest.*

Certainly, with quite as much force and propriety as our adversaries claimed that our action in the State Court waived and nullified the removal, *we might claim*, that *their* action in the Federal Court after the cause got there, waived and nullified all the proceedings in the State Court after the removal papers were filed and brought to the attention of the State Court, with demand for recognition of their effect.

After two unsuccessful motions to remand the cause to the State Court, the plaintiffs proceeded and took part in the trial in the Federal Court, *introduced there their evidence, and endeavored to succeed upon the merits*, and *voluntarily made* certain important *stipulations*, for which *see pages* 114, 116–17, 118–19 *of Record No.* 30.

If their own principles are to be applied, what is their answer to this proposition?

Then, it appears to be objected, that we were in the wrong, in *both* proceeding in the Federal Court in regular course,

in the suit which we claim to have been duly transferred there, and yet appearing in the State Court, objecting all the while to its jurisdiction, and still defending ourselves against the attack as best we might, carrying the case by regular course of appeal through the courts of the State, and finally presenting it for adjudication here upon the question of jurisdiction; and remarks are made as to the spectacle presented by the directly opposite decisions upon the merits by the two courts of different jurisdiction.

That practical embarrassments ensue whenever there arises a question of conflict of jurisdiction of this nature which can be ultimately determined only by this court, whose decision can be obtained only after long delay, whatever course may be adopted—may not be denied. But such embarrassment is inevitable, in any event, and whether the question be considered upon principles, upon authority, or upon arguments of convenience, it seems clear to us that the course we have here pursued is the proper one.

If the cause has been legally transferred to the Federal Court, *it is pending there, and nowhere else.* Clearly, the wrongful refusal of the State Court to recognize the removal, cannot take away, nor in the least detract from, the rightful jurisdiction of the Federal Court, *nor suspend nor intefere with* its exercise. The condition of the removal bond *compels* the removing party to appear in the Federal Court and file the transcript of the record there at the proper term. When the cause thus gets into the Federal Court, it is the right of *both* and of *each* of the parties, to have it proceed there in due and *regular* course, without any unusual delay.

If, after filing the record in the Federal Court, the removing party had failed to take the proper steps for carrying on the cause there in due course, we should probably have had to listen here to complaints of unreasonable delay and assertions that we had abandoned the removal. It is the interest, and probably the desire of the plaintiffs, that when the question comes before this court it shall be in such shape, as that this court shall be enabled to decide upon the merits, as well as upon the question of jurisdiction, if it holds the proper juris-

diction over the merits to be in the Federal and not in the State tribunals. The plaintiffs profess confidence in their being right upon the merits, and complain of having been so long kept out of their money.

If in this they are right, surely they cannot complain, that the case has been put in such shape as that this court can now give them a decision in their favor, and so give them their money presently, instead of merely deciding that the State Court proceedings are void, and that *hereafter* the case shall go to trial in the Federal Court to which it belongs, so that it may finally come to this court for decision upon its merits, three or four years hence.

Again, it may be greatly to the interest of the *removing* party that *he* shall have a speedy decision upon the merits. The removal may be by a defendant who has much to receive, or much pressure and burthen to be relieved from, by a favorble judgment, or, under the Act of 1875, the removal may be by a plaintiff and be wrongfully resisted in the State Court by the defendant. In any such case, it is as well the *clear interest as the clear right* of the removing party, to have the cause proceed in the Federal Court, in due course, without unusual delays.

It would be a thing not to be endured, that the *merely wrongful* refusal of the State Court to *recognize* the removal and which has been fully and effectually accomplished—should deprive the removing party of this, his clear right, and keep the case hung up on the Federal Court in a state of *utter inaction* during four or five years, while the case is taking its slow course through a series of State Courts, and on the appeal to this court, to the end of having the wrongfulness of the State Court's action judicially determined.

But we suppose that this question of the right to proceed in the Federal Court under the accomplished removal, regardless of the controversy of the State Court, is settled by authority, and quite familiar to the court, and we should not have spent so much time upon it had it not been for the elaborate contentions to the contrary, as well by intervening counsel who have filed briefs, as by the counsel for the plaintiffs.

Then, as to our right to appear and defend ourselves under

protest in the State Court, without prejudice to the removal, and to carry the case ultimately from the State Court to this court upon the point of jurisdiction, unaffected by our having proceeded to trial in the Federal Court, it appears to us that the proceedings are quite *harmonious*, and distinctly sustained upon unquestionable authority, and that such course is clearly required by consideration of conveniences.

While the State Court is insisting upon going on, regardless of the removal, and no decision of this court declaring such action wrongful is obtainable without delay, the *practical power* of the State Court and officers is pressing upon the removing party. The State Court, though without jurisdiction, renders its judgment, and issues its execution, and the State Sheriff strips the party of his property.

It is true the proceedings are void, and he may, if he chooses, test the question of jurisdiction *collaterally*, by action of trespass or otherwise.

But certainly, it is far better that he should test it directly, by contest before the State Court, and ultimate appeal to this court, and meanwhile save his property from wrongful seizure by means of a supersedeas bond.

MINOR OBJECTIONS TO SUFFICIENCY OF REMOVAL PROCEEDINGS.

There are two minor points which it may be proper to advert to.

1. It is said the removal became ineffectual, because the transcript was filed in the Federal Court on the second instead of the first day of the term.

It cannot be deemed necessary to spend time upon this.

It appears, by the sworn statement of the State Court clerk, filed in the Federal Court, that this delay was his fault, and not that of the removing party or his attorney (*Record No.* 30, *page* 110).

2. Then, it is said, that there was no effective appeal from the Iowa Circuit Court to the Iowa Supreme Court, and so, that

the case on appeal from the Iowa Supreme Court (*Record No.* 500, *new No.* 260) brings nothing before this court for review. If this were really so, it would give no substantial help, in the end, to the plaintiffs. If the case was legally removed, the subsequent judgment of the State Court, whether regularly appealed from or not, was and is a mere nullity.

But the point taken in this regard seems to us to be a fruitless quibble of the very smallest kind.

The point is this. The judgment appealed from was *entered up* May 22, 1875 (*Record No.* 30, *page* 66), and on July 5, 1875, duly appealed from to the Iowa Supreme Court (*same record, pages* 66–7).

On 18th August, 1875, Dennison, conceiving that decree thus entered and appealed from did not *correctly recite* the facts (relating mainly to the removal question, presented his petition to the State Court, praying a *correction* of this *statement of facts preceding* the judgment, but *not* asking *any* variation of the judgment itself. This is on *pages* 68–69 *of Record No.* 30.

This petition, after argument, was granted, and a correction made in the record in respect of the recital of facts preceding the judgment, *but in the judgment itself there was no alteration whatever* (*pages* 112–113).

Compare the two entries or records of the judgment on pages 66 and 113 respectively, and they will be found to be *absolutely identical.*

There was *no new judgment,* not even an amendment of the old judgment; but merely a *correction of a statement of facts answering to a bill of exceptions,* so as to make it conform to the truth.

Upon this state of facts, it is gravely argued that there has been no effective appeal; that the judgment which was appealed from was vacated and set aside, and so the appeal from it fell; and that there has been a new judgment and no appeal from that.

This idea would seem to have been conceived for the first time after the case got into this court.

After correct ascertainment of the facts on which it rests, it seems to us too plainly frivolous to require an answer.

Even if, pending an appeal, there were a mere *correction of the judgment* made by the court below, it would not impair the efficacy of the pending appeal; certainly not, if all parties went on and particularly treated the appeal as applicable to the judgment as standing corrected. But where the correction was not of the judgment, but of an accompanying statement of facts in the nature of a bill of exceptions, we think it would have occurred to few lawyers to imagine that any such point as this could thereby arise.

We trust we have shown that the jurisdiction of this controversy was legally transferred to the United States Circuit Court, and that the subsequent judgment of the State Court was unauthorized and void.

The Merits of the Real Controversy existing between the Parties.

It remains to consider whether the United States Circuit Court properly disposed of the controversy upon the merits.

There does not seem to have been any dispute as to the amount of the unpaid balance of the contract price of the work and materials done and furnished by the plaintiff. The question was, whether for this balance they had a lien upon the railroad prior to the mortgage title of Meyer and Dennison, as trustees for the bondholders.

The Iowa statute gives a mechanic's lien for work and materials upon a railroad, as against the owner of the road directing the work to be done and agreeing to pay for it, and against all subsequent mortgages, and it appears to have been decided by the Iowa courts that this lien takes precedence of mortgages recorded subsequently to the *commencement* of the work for which the lien arises, or subsequent to the making of this *contract for such work.*

In this case, the *subsisting mortgage* under which Meyer and Dennison are Trustees, though *dated* July 1, 1871, (it having been given in *substitution* for former mortgages of that date which were cancelled of record in order to accomplish certain correction of form required by the purchasers of the bonds issued under it,) was not actually executed and acknowledged until May 16, 1872, and it was *recorded June* 4, 1872. This will be found on *pages* 92 *to* 101, *of record, No.* 30. See also evidence of H. C. Jackson as to time of record of this mortgage and its remaining undischarged, on *page* 73 *of same record.*

No mechanics' lien arising *subsequently* to the record of this mortgage would take precedence of it. But the plaintiffs' claim of lien is based upon the fact, that their *grading contract* was made August 6, 1870, and the work under it commenced in September, 1870, and thereafter regularly prosecuted, and the greater part of the work done before June 4, 1872, although it was not completed until about December, 1872.

It was not until December 20, 1872, that they gave any public or record notice of their lien, by filing the required statement of it in the Clerk's office (page 13, record 30), yet the laws of Iowa are said to subject even a *bona fide* mortgogee to the peril of such a latent lien if arising for work done under a contract antedating the record of his mortgage.

The Iowa statute, under which the claim is made, provides that the lien shall not arise where the claimant has taken a collateral security.

We deny the lien, as against the mortgagees, notwithstanding the priority of the contract and of the commencement of work under it to the record of the mortgage, on two grounds:

1. Because, by a special provision of the contract itself, the grading contractors not only had no right to look for their payment to the railroad, but they had no personal claim even as against the railroad company itself, but were to look for their pay solely to "the citizens of Delaware County," who had arranged to pay for the *grading* of the road through their county. The scheme for getting this road built was the not uncommon one of the money for grading being furnished by the citizens of the county, partly by means of a special tax, and partly by voluntary subscriptions, leaving the company to raise the funds for ironing and equipping the road, and the other expenses other than grading by means of issuing mortgage bonds, or otherwise, as they might be.

It was arranged that the grading work should be done by the "Delaware County Construction Company," these plaintiffs, and that they should look for their pay to the citizens of their county, who had arranged to furnish it.

It seems that after the Construction Company and the Railroad Company had negotiated as to the doing of the work, &c., and the price, the *former* drew up, and signed a contract providing for the work and materials, &c., and the price without any clause embodying the arrangement by which the contractors were to look not to the company but to the Delaware County citizens for their pay, and sent it to the President of the Railroad Company for his signature, but he, discoverging the omission, refused to sign it in that shape. He thereupon,

after the signatures of the directors of the Construction Company, inserted before his own signature the words: "All the money for the work herein before specified to be paid by the citizens of Delaware County," and then signed it "H. Price, President, Dav. and St. Paul R. R. Co." (*page* 16, *Record* 30).

With this addition, the Construction Company received and accepted the contract, and went on with the work.

Hiram Price, the President of the Railroad Company, who thus insisted upon this clause as a condition of the contract, was examined as a witness in the Foreclosure Suit Record, No. 29, and by the stipulation on page 118 of No. 30, the depositions taken in No. 29 were used in No. 30.

This evidence of Price is found on pages 255, 256, *and again on pages* 99 *to* 101; *Record, No.* 29. It fully explains the circumstances under which this clause was inserted, and that the intention was that the Construction Company should *not* look for payment to the Railroad Company, but *should* look for payment to the Delaware County citizens. That he refused to sign and would not have signed the contract without insertion of this condition.

We assume that the Court will read the testimony of this important witness, and therefore will not quote further from it.

On looking at the signatures to this construction contract on page 16, record No. 30, it will be noticed that *F. B. Doolittle* was *Treasurer*, and one of the three persons composing the Board of Directors of the Delaware Construction Company.

Doolittle was also appointed *Assistant Treasurer* of the Davenport & St. Paul Railroad Company.

While Doolittle occupied this double relation of Treasurer and Director of the Construction Company, and Assistant Treasurer of the Railroad Company, the matter of receiving the money for the Delaware County taxes and subscriptions was committed to him.

On page 245, record 209, attached to Doolittle's testimony will be found copies of a resolution of the Railroad Company appointing Doolittle Assistant Treasurer, Exhibit F, and the written authority and instructions given to him for collecting and paying over the Delaware County taxes and subscriptions,

Exhibit G, and on pages 231 and 232 of Record 29 will be found two orders given February 24, 1871, and February 18, 1871, by Price, as President, in favor of Doolittle, Assistant Treasurer, directed to the Treasurer of Delaware County, and ordering him to pay over to Doolittle the taxes collected in Delaware County.

Doolittle's evidence on this subject will be found on pages 243–4, Record 29. He was one of the parties interested in the Delaware Construction Company, and, of course, was on their side as far as he could be.

We quote from his testimony as follows:

"The amount of taxes and subscriptions collected by the "Davenport & St. Paul Railroad Company in Delaware "County, was not as much as was paid to the Construction "Company by the railroad company. The railroad company "paid the Construction Company $139,189.46, of which $70,000 "was paid out of funds not collected in Delaware County. The "balance was paid from funds collected in Delaware County. "There is about $12,000 of taxes and subscriptions yet uncol- "lected, between $8,000 and $9,900 of which the Treasurer has "been enjoined from collecting. The injunction suit was "between the taxpayer and the Davenport & St. Paul Railroad "Company.

* * * * * * *

"I collected the taxes and subscriptions in Delaware County "by the authority of and for the Davenport & St. Paul Rail- "road Company, as Assistant Treasurer of that company. I "have the authority given me by the company so to do."

It is produced and marked Exhibit F.

* * * * * * *

"I disbursed the taxes and subscriptions collected in this "county under the direction of the railroad officials. I do not "now recollect who the executive committee were at the time I "got my direction for disbursing the funds. I did know at the "time. I had verbal directions from time to time from the "President from the time of my first appointment. *I had writ-* "*tendirections which I now produce.*" Said *directions* are offered in evidence by said defendant which *are marked Exhibit G.*

On page 245 appears Exhibit G, which is *extremely important*. We quote it as follows:

"*Resolved*, That F. B. Doolittle, *collector* of the D. & St. P. "R. R. Co., be and he is hereby *directed* to pay out of the "funds collected by him in Delaware County, Iowa, belonging "to said company, the salaries and necessary travelling "expenses of himself and the division engineers for said "county, also to pay for right of way and expenses for the "same, *and to pay to the Delaware Railroad Construction Com-"pany eighty per cent. on the estimates of the chief engineer for "work done by said Delaware Railroad Construction Company* "on construction of the D. & St. P. R. R."

This is certified to have been passed December 28, 1871.

Now it is clear that this claim for a mechanic's lien must fail in law if we establish *either one* of two propositions.

A. That by the terms of the contract under which the work was done, the Construction Company had not the right to hold the Railroad Company personally liable, but were bound to look exclusively to the Delaware County taxes and subscriptions. If the Railroad Company was not bound to pay, of course, there could be no lien on their railroad—and if under the terms of the contract there was no lien as against the mortgagors, *a fortiori* there could be none as against the mortgagees.

B. That the Construction Company took collateral security for their payment to them for their work and materials.

We confidently submit that *both* these propositions are established in our favor.

The clause which the President of the railroad company *insisted upon inserting, before he would agree to the contract*, must certainly be assumed to mean *something* and to have *some* effect. Clear rules of construction required this. It must be assumed that it meant *something* at least, and effect should be given to that intention.

We submit that it is clear *upon the clause itself*, that the meaning and effect of this clause of the contract was, as Price in his testimony declares to have been the case, that the Delaware Construction Company were to look for their pay, *not* to the railroad company, but to the citizens of Delaware County.

But if there were any doubt as to this *upon the clause itself*, it is made clear by the evidence of the *surrounding circumstances*. By this we do not mean Price's declaration of what he intended, but the evidence which is competent and effective to explain if need be the meaning of the clause—viz., the arrangements which had been made for providing funds for this purpose by the Delaware Company, taxes and subscriptions, and the seeking of the contract by the members of the Construction Company, upon the basis of their being paid from this source, and the insertion of the clause by the President of the railroad company, by way of addendum, as a condition—without which he would not sign—requiring the application of the like principle as where written words are inserted in a printed policy of insurance.

But suppose it could be construed to mean that the Construction Company were to look *primarily* to the Delaware County subscriptions and taxes, with a right to look ultimately to the railroad company for any deficiency there might be. It seems to us that this would be an unauthorized nullification of part of the clearly intended effect of the clause in question, but let us suppose it to be conceded. It would still leave the clause entirely fatal to the plaintiff's claim of lien. If by the terms of the contract their resort was to be to the Delaware County taxes and subscriptions *at all*, though with recourse over against the railroad company in case of deficiency; we have the circumstance which under the statute precludes the lien, viz., the taking of another or collateral security for payment.

If the plaintiffs say the clause in question does not mean either of the these two things, they are driven to claim that it was utterly meaningless and useless, and thus to hold would be a clear violation of one of the first principles of construction.

But upon the point of the plaintiffs having taken other or collateral security, the case is by the other evidence made still clearer, and put beyond question.

Under the statute, taking additional or collateral security in *any* form or manner precludes the arising of a mechanic's lien. It matters not whether it be by personal suretyship, deposit, or pledge of security, legal assignment or *equitable assignment, or order upon a particular fund, operating by way of equitable assignment*, or by any other means howsoever.

Now, let us suppose that the record of one mortgage had antedated this construction contract, or that for any other reason it had been hopeless for the Construction Company to seek resort to a mechanic's lien for their security or payment, and that the actual case in controversy was this, viz. :

That after the making of this contract, with the clause that " all the money for the work should be paid by the citizens of Delaware County," and that after the collection of the Delaware taxes and subscriptions had been placed in the hands of Doolittle, occupying his double relation of Treasurer of the Construction Company and Assistant Treasurer of the railroad company, under just the arrangement which was actually made in that regard, and there had been delivered to him the orders for the taxes on the County Treasurer, (Exhibits A & B, page 130, Record 20) and likewise the order (Exhibit G, page 245, Record 29), *directing* him to pay over the collections to the Construction Company on account of their work, the Railroad Company, after the Construction Company had gone on and performed the work in reliance on the clause of the contract above quoted, and the orders and directions given for carrying it out which are above referred to, the railroad company having become insolvent, had undertaken to *revoke* the orders and cancel the whole arrangement for appropriating the Delaware subscriptions and taxes to this purpose, and instead, to assign those subscriptions and taxes to secure some other creditor whom they might desire to favor, and leave the debt, owing to the Construction Company, to become a total loss to them, and under such a state of facts the Construction Company had sought redress in a court of equity.

Can any one doubt that they would have obtained such redress? That court would have found no difficulty whatever, under the well-settled doctrines relating to equitable appropriations and assignments and orders upon a particular

fund, that there had been an irrevocable appropriation and equitable assignment of the particular fund for this particular debt, and that the order, Exhibit G, contained a valid direction to Doolittle, as collector of the fund, to pay it over, when collected, to the Construction Company, according to the directions of Exhibit G, which, being an equitable appropriation or transfer of a particular fund, founded upon valuable consideration, and given in preference of a previous executory agreement for such appropriation, viz., the clause in the original contract, added by Price, was clearly irrevocable, and that though Doolittle might *collect* the fund as Assistant Treasurer of the railroad company, it, when collected, became subject to the equitable trust; and that Doolittle's character of Treasurer of the Construction Company was not to be lost sight of; that the order under which he was to *collect* the money, as Assistant Treasurer of the railroad company, and appropriate it to the Construction Company, under which he would have only to *pay it over to himself* as Treasurer of that company, must be regarded as having been *delivered* to him in *both* companies.

Upon thus clearly ascertaining that there had been an appropriation and equitable assignment of this fund, which secured its application to payment of this contract price, and was irrevocable by the railroad company, we have ascertained and established that there was here a taking of additional or collateral security, which, under the Iowa statute, precluded the arising of a mechanic's lien.

We have next to consider the attempted striking out of this particular clause of the contract (which had been added by Price) by the arrangement of July 1, 1872, and the effect of that operation.

It is very plain that this cannot help the plaintiffs out of their difficulty.

1. This action has *no effect whatever*, upon the fatal point of additional or collateral security having been taken. As to what had been already realized from such collateral security, of course it could not *undo it*—and as to what was yet to be realized from such collateral security, it left the appropriation and equitable assignment, and the orders

Exhibits A, B, and G above referred to, remain in full force. It merely undertook to annul the provision of the contract that the Construction Company should not be entitled also to personal recourse against the railroad company.

But even in respect of the attempt to annul the particular effect of that clause, it is wholly ineffectual to enlarge the rights of the Construction Company as against these mortgages.

As to that, the fatal difficulty in the plaintiff's way is, that it was *subsequent to the recording of our mortgage.* The mortgage was recorded June 4, 1872, and this attempted change of the contract, so as to make our mortgagees personally responsible for the debt for which the lien is claimed, while up to that time they were not so responsible, was not until July 1, 1872.

If the plaintiff had no lien, as against us under the contract as it stood when our mortgage was recorded, no subsequent change of the contract could give them such a lien as against us.

If they claim under the new agreement, they must claim as of its date July 1, 1872, and to that our mortgage is paramount.

We observe in the record some attempt at one time made to refer this attempted change of the contract to a date earlier than the record of our mortgage, as if to make it out as a change agreed to on June 3, instead of July 1.

Whether this attempt was finally persisted in in the court below, or will be again made here, we know not; but be that as it may, *it certainly cannot succeed.*

There seems to have been an attempt made at one time to prove that the agreement to strike out this clause in consideration of a deduction of $2,000 from the contract price, was made between executive committees of the two companies on the 3rd June (See pages 250 and 251, Record No. 29—but the attempt broke down.

On page 250 on the direct the witness says, there was such an agreement *between the committees* at the alleged meeting on May 3—but on cross-examination he admits that though at the meeting there were present all the members of the Executive Committee of the Construction Company, there was present only one member of the Executive Committee,

of the railroad company, and that that committee consisted of *either three or five* members.

Of course there could have been no action of that committee at the meeting.

Fortunately we have better evidence of the truth tn this regard.

The attempt to carry back this arrangement to June *third* was manifestly an afterthought, after the *pinching point* was discovered.

On reference to the plaintiff's original complaint, or petition and the documents annexed to it, we ascertain the truth.

On page 17 of Record 30, we find a copy of the resolutions and the Board of Directors of the Delaware Construction Company, at their meeting of *July* 1, 1872.

This *embodies* a copy of the resolution of the *Executive Committee* of the Board of Directors of the Davenport & St. Paul Railroad Company, the date of which was June 5th, instead of June 3d, as pretended—and therefore one day after record of our mortgage.

But further, by the express terms of that resolution of the Executive Committee of the railroad company, their agreement to strike out the clause in question from the contract did not take effect *in presenti*, but was executory and conditional, as follows: "On the condition and *agreement* by the said company by *a resolution by its Board of Directors*, to abate of the claim under said contract the sum of two thousand dollars."

And thereupon, *at their meeting on the* 1*st of July*, 1872, the Board of Directors of the Construction Company accepted the offer, and passed the resolution to abate the $2,000, the passage of which resolution was a *condition precedent* of any effect whatever resulting from the resolution passed by the Executive Committee of the railroad company, on the 5th of June (see this resolution on pages 17 and 18).

Clearly, therefore, the original clause remained in force.

But even had the two companies agreed to change it on the 3d of June, that would not help the plaintiffs.

The work, mainly, *had been already done*, under a contract exempting the mortgagors from personal liability. If after that, the railroad company chose to bind themselves, for this bonus or deduction of $2,000, to make themselves personally liable for the past work, doubtless they could so *bind themselves per-*

sonally—but they could not thereby create a latent (unrecorded) mechanics lien, which should override the rights of subsequent *bona fide* mortgagees.

Under the statute, the mortgagors were subject to the peril of such latent lien for the price of *work done under a contract, for payment whereof* their mortgagors were by the term of such contract liable. But in order to create the lien, the obligation for payment must have been subsisting when the work was done.

A mechanics' lien could no more be created by this special contract, to pay for past work done under such a contract as this, which excepted the mortgagors from personal liability to pay for it, than by a special contract to pay for work which had been done for *some other railroad company.*

Upon the various grounds and reasons above stated, we submit that the decision by the United States Circuit Court upon the merits of the controversy between the lien claimants and the mortgagees was clearly correct, and should be affirmed.

The proper Decree to be made herein.

If this court, while sustaining the jurisdiction in 210, should decide the merits of that case against us, it will hardly be disputed that the proper decree, instead of one confiscating the property as was made by the State Court will be, that there be now a sale of the property free from the mortgage, for satisfaction of the mechanics' lien, with leave to the mortgagees to prevent any such sale by paying the debt and costs, or, possibly, that the mortgagees stand foreclosed, unless they pay the debt and costs within such reasonable time as shall be fixed by the decree for the purpose.

The former appears to us to be the correct decree in principle, but should the latter be made instead, it would be of no practical difference, as the property is worth many times the amount of the debt, and the debt would of course be paid.

If both No. 30 and 260 are decided in our favor, the affirmance of 29 would be a matter of course. But if the court should

hold the jurisdiction point against us and affirm 260, and wholly reverse 30; or, if reversing 260 on the point of jurisdiction, they should also reverse 30 upon the question arising on the merits, it will be necessary to consider very carefully what judgment shall be rendered in 29.

In the case *last* supposed, of both cases being held in our favor on the point of jurisdiction, but 30 adjudged against us on the merits, there would be no *practical* question as to the judgment in 29. It might be practically the same as in 30, and its effect would be ended by payment of the amount of the lien.

But if the court should decide the jurisdictional point against us, and affirm the judgment of the State court in 260, there will arise a question of great importance as to what judgment shall be rendered in 29—and this, as we have before observed, would involve a much larger pecuniary interest than was originally involved in the two other cases.

In No. 29 there are fairly presented for *final adjudication*, free from all *question of jurisdiction*, all the matters in controversy between the Trustees of the mortgage and The Delaware Construction Company, and the Delaware Railroad Company, (claiming under them by alleged transfer of the title under the sheriff's deed), not only in respect of the originally claimed mechanics' lien and its alleged priority, but likewise in respect of the title set up to the road itself, under the sheriff's sale and the judgment of the State court against Dennison.

No. 29 is the suit brought in the U. S. Circuit Court for foreclosure of the railroad company's mortgage to Thompson & Dennison, as Trustees for the bondholders. It was originally commenced by Moses DeWitt Loomis, a bondholder, Dennison, their sole surviving Trustee, being made a defendant.

After Meyer's appointment as Trustee in place of Thomson, deceased, which appointment was completed March 12, 1875, by Meyer's acceptance (*Record, page* 12–12), viz.: on May 4, 1875 (*Record, page* 1), and which was *after* the judgment originally taken by default upon publication against Thomson & Dennison, had been *set aside* by the appearance of Dennison, as survivor, on 26th January, and the order for new trial obtained by him, and *before* any such trial had taken place, Meyer in-

tervened in the Loomis suit, and himself as Trustee filed a cross-bill of foreclosure in that suit, in which he made defendant's, among others, the Davenport & St. Paul Railroad Company, Dennison, The Delaware Construction Company, and the Delaware County Railroad Company, in which he alleged that the liens claimed by the Delaware companies were subordinate to his mortgage.

This bill is on *pages* 1 *to* 8—the papers showing Meyer's substitution as Trustee in place of Thomson on *pages* 9 *to* 12—the *subsisting* mortgage on *pages* 23 *to* 32. On *page* 30 will be found the provision relating to changes in the trusteeship, which is that in case of vacancy occurring by death or otherwise, it shall be filled by written appointment of a successor by the majority of the bondholders, but that *during the vacancy*, the surviving or continuing Trustee shall be vested with the trust.

To this bill the Delaware Construction Company, appeared June 7, 1875, *page* 46, and on July 27, 1875, filed their answer, claiming priority (*pages* 46–7–8). The Delaware County Railroad Company, appeared September 3, 1875, and on 4th October, 1875, filed their answer, claiming priority of the lien, and setting up title to the Delaware part of the road under the Sheriff's deed, and the alleged transfer of that title to them, and the judgment of the State Court against Dennison (*pages* 72 *to* 75). The replications to these answers appear on pages 53 and 87.

On December 6, 1875, the Delaware County Railroad Company filed a cross-bill against Loomis, *Meyer & Dennison* and *John E. Henry, Receiver of the Davenport and St. Paul Railroad*, having obtained from the court leave thus to sue its Receiver. This bill is *on pages* 83 *to* 86.

This cross-bill states that Loomis' suit was commenced in December, 1874, and in that suit, George H. French was, on December 17, 1874, appointed Receiver of the Davenport and St. Paul Railroad, and that in March, 1875, John E. Henry was appointed Receiver in place of French, and took possession and has ever since held the railroad as such Receiver, and that afterwards Meyer filed in said suit his *substituted bill* for foreclosure of the mortgage.

It then sets forth the alleged title of the cross complainants to the Delaware part of the road, which it alleges became perfect on 4th May, 1875, (that being the expiration of one year

from the original Sheriff's sale), and that ever since that day possession has been wrongfully withheld from them by Henry as Receiver, to their damage at the rate of $2,000 per month, *and prays for a decree directing Henry to delivery the possession to them, and pay them such damages.*

Meyer's answer to this cross-bill is on pages 88 to 92.

Thus it is seen that the holders of the title under the Sheriff's deed have voluntarily submitted their rights to the determination of the Circuit Court, and the jurisdiction of this court to determine upon the merits of that question is beyond dispute.

The contention of our adversaries is, (assuming the decision upon the *removal* question to be in their favor) that by reason of the shape and extent of the judgment of the State Court, however flagrantly wrong it may be, in absolutely foreclosing the mortgagees without giving them any opportunity to pay off the mechanics lien upon its establishment, we have lost our railroad beyond chance of recovery or redemption, as the inevitable result of simply and fairly presenting for judicial determination the question of the existence or non-existence as paramount to our title as *bona fide* mortgagees, of an alleged *secret* lien for a sum equal to only about one-eighth the value of the road, resting upon alleged circumstances to which we were entire strangers, and which lien in the opinion of the federal judiciary was subordinate to our title.

We may safely assume that this court would never render so harsh and inequitable a decree, if it could possibly avoid it.

We do not deem it needful to discuss the question whether, in case of the non-existence of the *two* grounds which we are about to state, and *either* of which furnishes a conclusive answer to the proposition asserted by our adversaries, this court would feel itself bound to give to the State Court judgment the unjust effect which is claimed for it. We trust that even without those grounds, this court would find itself free to do justice between the parties.

But upon careful examination it will be clearly seen, not only that this court is not bound to allow this railroad to be

thus confiscated, but that it could not do so without clear violation as well of our strict legal rights, as of substantial equity and good conscience.

The two grounds to which we refer are as follows:

FIRST REASON WHY THE JUDGMENT OF THE STATE COURT IS NOT CONCLUSIVE UPON THIS COURT.

1. It is admitted that *as against our mortgage title* to this property, the plaintiffs had, originally at all events, merely a money claim, with a lien for the amount upon the mortgaged premises, which was *serviable, as against the mortgagees, only by proceedings in equity against them.*

This was the *status* when Meyer filed his bill in equity in No. 29, bringing both these Delaware claimants before the court for adjudication of their rights as between them and the mortgagee, and *at this time and ever afterwards*, the *res*, the railroad upon which the plaintiff's lien is asserted, was and remained in the *actual possession of the United States Circuit Court*, through its officer, John E. Henry, the receiver appointed in this suit, No. 29.

Before Meyer as Trustee, thus filed his bill, the judgment by default upon publication, which had been taken by the lien claimants, as against Dennison and Thomson (Meyer's predecessor), had been duly and completely *set aside*, in pursuance of an absolute right given by the State Statute in respects of judgments thus obtained without service of process or actual notice to the defendants—the action thus setting aside the judgment having been taken on January 26, 1875, by Dennison, as surviving Trustee in the *interval* between Thomson's death (May 23, 1874), and the appointment of Meyer as his successor (March 12, 1875). *During this interval, but no longer*, Dennison was vested with the entire trust estate, the provision of the mortgage deed being (*page* 30) that the surviving Trustee shall be thus vested, *during the vacancy.*

Thus, when Dennison appeared and set aside the old judgment by publication, as matter of absolute right, Dennison

was the full and complete *representative for the time being* of the entire title of the morgage Trustees, as well that which had been originally vested in Thomson jointly with himself, as his own trust title; and when that judgment was set aside and the trial awarded to Dennison, the old judgment by default on publication was clean gone forever, and as if it had never been.

On March 12, 1875, Meyer was duly substituted as Trustee in place of Thomson, deceased, and upon such filling of the vacancy, Dennison's temporary representation of the original joint trust, interest and estate of Thomson *ceased.*

From March 12, 1875, onwards, this mortgage title was vested in Meyer and Dennison as joint Trustees; and upon Meyer's thus succeeding to this joint trust estate, the status as between him and the Delaware claimants was that as against his trust title they had a *lien* and *nothing but a lien.*

They had no *title* to the property, *as against Meyer*, and could get none as against him, without *either his deed* or a *decree against him*, in *proceedings in equity* against him, for the enforcement of the lien, as the Iowa statute requires.

Now, clearly, *as against Meyer*, nothing has happened up to this day to divest his title, or to convert into any title as against him, the lien of the Delaware claimants.

Whatever effect may be given to the State Court judgment as against Dennison, the Delaware claimants, if they have anything they have now a mere lien and nothing but a lien.

Even if it be considered that, under the Sheriff's sale of the title of the mortgagors, the Sheriff's grantees hold *a* title, subject to an equity of redemption vested in the mortgage Trustees, such equity and right of redemption remain until it is duly released or foreclosed.

There is no pretence of a release by either Trustee, and if it be held that the State Court decree forecloses Dennison, or would foreclose him if he were sole Trustee, there is no pretence of a decree or of anything foreclosing Meyer; *and therefore, as against him the equity of redemption still exists*, and he is entitled now to redeem within a time to be fixed by decree in this suit.

The title of the mortgagees in trust is a *joint trust estate.* The bondholders are the beneficiaries of the trust, and though

their equitable rights may be liable to be cut off by the *joint* deed of the Trustees (not in contravention of the terms of the trust), or by decree or judgment duly *suffered* by, or *recovered* against, *the Trustees jointly*, no such deed executed by, or judgment or decree suffered by or recovered against, *one only* of the *joint holders of the legal estate held in trust for them*, can take away or in the least affect their rights as beneficiaries of the trust. The separate judgment or decree against one only of the joint Trustees is just as ineffectual and null as the separate deed of release executed by one only would have been; and, certainly, it cannot be denied that any separate deed, or other voluntary act of Dennison alone, to the end of divesting the joint trust estate or any part of it, would have been null and void as against his co-Trustee and against the beneficiaries of the trust.

It makes no difference that Meyer's joint trust estate and interest was acquired after the commencement of the original proceedings in equity by the Delaware Construction Company for enforcement of their lien, as against Dennison and Thomson (Meyer's predecessor).

Here was no voluntary change of interest *pendente lite*. Where such a voluntary change takes place it is sometimes held that the adverse party may proceed against the original party in disregard of it, and whether the voluntary purchaser *pendente lite*, shall be directed to be brought in, or allowed to come in upon his own request, may be a matter of discretion of the court.

But the reasons on which this rule of procedure is founded, have no application where the change of interest is occasioned by *death*, or otherwise by *operation of law*, and accordingly, it is a well settled and familiar rule that in all such cases the the change of *interest* must be taken notice of.

In this case, indisputably, the change of this joint trust estate, occasioned by Thomson's death and Meyer's substitution in his place, was a change by operation of law.

It was the duty of the plaintiffs, at their peril, to bring in Meyer as a defendant, and as the *sole* representative (*after* his appointment) of the trust estate and interest originally held by the deceased Trustee Thomson.

If the plaintiffs had had *no knowledge* of Meyer's *accession to the trust title*, and had *ignorantly* gone on against Dennison as representative of the joint trust estate, when in fact he was not, and had thereupon proceeded to obtain a lame and ineffectual decree against Dennison alone, which could not operate as against the joint trust estate; it might have been a misfortune for which they should have been commiserated, if their decree had been legitimate, fair, and honest; being flagrantly wrong and unjust as it was, their failure for any reason to accomplish the injustice intended, is to be rejoiced at in the interest of justice.

But it is needless to consider the question upon the assumption of ignorance by the plaintiffs of Meyer's title and rights. They had full notice in the most direct form from Meyer himself, and not only neglected to bring him in as a party, as they were bound to do at their peril, but opposed his application to him.

Of course, they must take the consequence of their own choice to go on with their suit against one only of two joint Trustees, and of the consequent worthlessness of the decree they induced the State Court to make.

We notice that the plaintiffs now undertake to raise in this court some technical objections to the fullness of proof in respect of Meyer's appointment as Trustee, and in respect of the holdings of bonds under the mortgage.

It is manifest that there was no actual contest in the Circuit Court, the controversy did not in the least turn upon them, and no such points can now avail in this court.

The proper disposition of this case as between the mortgage Trustee and the Delaware Companies does not in the least require any plenary proof on these points.

This is not a case where any affirmative relief is sought, as against the Delaware Companies, or either of them, by way of *enforcement* of the rights of the bond holders under the mortgage.

The existence of the mortgage and of outstanding bonds under it (*it matters not in the least to what extent* for the purpose of any determination between the Delaware Companies and

the mortgagees in trust), is repeatedly recognized by the plaintiffs.

In their original complaint a petition *page* 129 *of record* No. 29, they *themselves brought in as parties and prayed to foreclose* "John Edgar Thomson and William Dennison, Trustee, *for certain bondholders* or said Davenport & St. Paul Railroad," stating that Thomson and Dennison as such Trustees had liens on the property, but that the plaintiffs lien was paramount.

The answer of the Delaware Construction Company to Meyer's bill pages 46-7-8 does not deny the holding of the bonds.

The two last clauses of the answer of the Delaware Railroad Company, page 75, admits the holding of bonds under the mortgage, but sets up a defense *which is wholly unproved*, and would be *unavailable to these parties* if it were proved, that there was some contravention of Iowa laws in issuing bonds to *too* large an amount, they claiming that with the amount of capital the company had, it could lawfully issue no more than $2,000,000 of bonds, and that therefore the issue of three millions as stated in Meyer's bill was excessive, and they aver that *the holders of said bonds* had due notice thereof.

The trust mortgage originally given to Thomson and Dennison is an exhibit.

The stipulation on page 102, between the two Delaware Companies and "*Lewis H. Meyer and William Dennison Trustees*," expressly admits the record of this mortgage in Delaware County, on June 4, 1872; and the stipulation itself recognizes Meyer and Dennison as the Trustees under it.

The record contains numerous other recognitions by the lien claimants of Meyer as being a Trustee under this mortgage.

Meyer as Trustee is made a defendant to the Delaware County Railroad Company's cross-bill.

Of course, there is no doubt of Meyer being really the substituted Trustee, as the very formal documents which made him so were set forth by way of schedule to his bill for foreclosure, *pages* 9 *to* 12, *Record No.* 29, and it would seem idle to go through the formality of remanding the cause for the purpose of having this fact proved, when it has been practically assumed and conceded.

See also the stipulation signed by the solicitor of the two Delaware Companies, which is made with "Lewis H. Meyer and William Dennison, Trustees," on *page* 225 *of Record.*

Also the very formal stipulation and agreed statement of facts on *pages* 95 *to* 99, made between "Lewis H. Meyer and William Dennison, Trustees," complainants, and the Delaware companies.

The question at issue was, and is, whether the Delaware lien claim was and is paramount or subordinate to the mortgage given to the Trustees for the bondholders.

We have the mortgage itself in proof, and an admission of its due record on June 4.

Thus we have the *legal mortgage estate* clearly established, and we have recognitions by the lien claimants, at the very outset and repeatedly afterwards, of their being bondholders under this mortgage.

For the purpose of determining this quesion of priority, this is all that is essential. The amountt of the mortgage debt, for which the legal mortgage estate is held in trust, is wholly immaterial to be enquired into for the purposes of this controversy with the lien claimants.

And so, in respect of the right to redeem from the lien claim, if the court decides that it has priority. Everything necessary to show such right is proved or admitted, either in express terms, or by necessary implication. For the purposes of such redemption, it needs only that we have *a mortgage title*, that appears indubitably, and the suit of our adversaries was brought for the express purpose of foreclosing that mortgage title, and it is *a necessary incident always* of such a suit, that the defendant may avoid foreclosure by payment or redemption within such time as shall be allowed by the court.

We think, therefore, that it has been conclusively shown, even if this court sustains the retention of jurisdiction by the State Court, and affirms its decree, that the only proper decree in *No.* 29, upon the original bill of Meyer, and the cross-bill of the Delaware Company must be one requiring payment of such amount as this court may adjudge to be due upon the

lien with costs, and that in default of such payment, there be a sale of the mortgage title, or, at the worst as against us, a decree that the grantees under the Sheriff's deed be permitted to hold, and Meyer as Trustee be foreclosed, in default of payment of the sum adjudged to be due, within the time limited therefor.

But it also seems clear to us, and we respectfully but earnestly submit to the court, that in such case of the jurisdiction of the State Court being upheld, that although as against Dennison, if he were sole Trustee, the State Court judgment might be conclusive both upon the point of priority of lien, and upon the part of foreclosure, taking place without affording opportunity for payment or redemption, *as against Meyer's* trust title, the State Court decree against Dennison is not at all binding or conclusive upon *either* point.

And this upon undeniable principles.

Meyer was no more subject to be concluded or in any way bound or affected, in respect of the first question than of the second, by the judgment rendered in a suit against Dennison, only to which he was not and ought to have been made a party and in which, moreover, the plaintiffs wilfully neglected and refused to bring him in as a party and give him a chance to litigate the question in which he was interested. *Non constat*, if that had been done. but that he or counsel for him might have brought the State Court to a different conclusion, even on the question of priority of lien.

And the joint trust estate of the mortgagees in trust for the bondholders, being joint and not possibly severable practically, for the purposes of adjudicating this question of priority, if Meyer, as Trustee, is not at all affected by the State Court judgment, the whole question of priority of lien as against the joint trust estate of the mortgagees in trust, is now open to Meyer for litigation upon the merits in No. 29, according to the prayer of his bill appearing in that record, and should accordingly be disposed of by this court upon its merits, unaffected in any way by the State Court judgment.

And in such case we refer the court, for our reasons for asking the determination of it in our favor, to the argument upon the merits which we have presented in case No. 30.

And if it be claimed that in disposing of the question upon the merits, the court should respect and follow the opinion of

the State Court, through comity, though not technically binding as a judgment, upon the principles which this court usually applies in respect of State Court's decisions in respect of construction of their owe statutes, we reply:

(*a.*) That rule of comity is by no means without exception. It does not fairly apply to a State Court decision, which has not become an established rule of law of the State, but has been rendered recently, and subsequently to the arising of the controversy brought before this court, as is the case here, or where, for any other peculiar reason, the decision appears to this court one not worthy to be respected or followed.

This court has heretofore had occasions, in a well-remembered case coming up to it from this same State of Iowa, to assert and apply this exception to the general rule, and we submit that here there is an equally suitable case for the exception.

(*b.*) The rule of comity relied upon has no real application to this case. Here there is not, in substance, any question of *construction of the* State statute. That is plain, clear, and simple enough.

As to the question of taking collateral security so as to preclude the lien, it is a mere question of fact arising in an equity case, as to which this court passes its own independent judgment; as to which the rule of comity before referred to has no possible application, and as to the independent effect of the special clause added to the contract, providing that the payment shall be by the citizens of Delaware County, the question of its construction and effect, is one depending upon general principles of law, and not upon any State Statute, and the rule of comity referred to is alike inapplicable to it.

Second Reason Why the Judgment of the State Court is not Conclusive upon this Court.

But there remains the second and independent ground, upon which, if it stood alone, the attempt of the plaintiffs to

confiscate this railroad by means of the State Court decree against Dennison, would necessarily be defeated.

Long before and at the time when the Dennison judgment was rendered, *the property*, the title to which was sought to be divested by that judgment, *was in the actual possession and under the guardianship and control of the United States Court in Equity, through its Receiver*, appointed in the suit brought on behalf of the mortgage bondholders, for enforcement of their rights and determination of the conflicting claims of the lien claimants, who were made parties defendant, so that suit afforded ample room and means for a proper determination upon the rights of these claimants.

While the property was thus actually in the custody and care of the Federal Court, through its Receiver, it was not competent for the State Court, *without the permission of the Federal Court so having it in custody*, to make any decree passing *its title and the right to its possession*, from the parties on whose behalf the Federal Court had taken it into its custody, to another party, and especially not to parties who were before the Federal Court with full opportunity for assertion and protection of their rights there, although this latter circumstance is not very important, the disability so to interfere with the title and possession being *general*, as to all parties whomsoever.

This is just what the State Court undertook to do, and what it is claimed by our adversaries it did accomplish. The prayer of their cross-bill is, that the Federal Court Receiver be adjudged to submit to the judgment of the State Court as operative to transfer the title from the Federal Court litigants, and the possession from himself as Receiver of that court, and that he shall on that basis be adjudged to deliver over the possession to the claimants under the State Court decree, and to pay them damages for the continuance of his own possession as Receiver, from the time of the State Court decree, upon the basis of such possession having been wrongful.

In this action the State Court transgressed its powers.

While the Federal Court *held the property in its actual possession through its Receiver*, the State Courts or officers could not, *without leave of the Federal court*, transfer its title or possession, either by sale on execution by decree, or otherwise howsoever.

If it be argued that the State Court should have been permitted to go on because the suit of the lien claimants was originally instituted before the Federal Court took the property into its possession, the answer is easy.

The actual possession was in the Federal Court under the mortgage title. There was *no pretence of possession* nor any attempt at *present possession*, in the State Court suit. It was simply to enforce a money demand, with no prayer for right to a Receivership, and which, under any legitimate decree, could not operate to transfer the title or possession, unless after decree establishing the lien and fixing a time for payment and decreeing foreclosure in case of default, such default thereof occur.

Under such circumstances as these, if the plaintiff, in the State Court suit conceived, that by reason of priority in its commencement or on any other ground, they ought, after the property had been taken into the actual possession of the United States Court in the foreclosure suit, to go on with their in the State Court for enforcement of their lien, instead of having it determined in the Federal Court, under the appropriate proceedings there pending, and to seek a decree in the State court operating to divert the title and possession under which the property was actually held in the Federal court, it was incumbent on them before doing so, to ask and obtain permission so to do, from the Federal Court, which held the property in actual possession.

Having chosen to go on and take such steps without such permission, their proceeding was in contempt of the authority of the court which actually held the property, and inoperative as against that court, and against the parties to the suit in which it held the possession, and as against any and all subsequent orders and decrees of the Federal Court in the suit in which the possession was held.

These mechanics lien claimants ultimately found it necessary to apply to the Federal Court for permission to take legal proceedings against its Receivers. Their mistake was that they did not ask such permission before undertaking to go on with the proceedings for obtaining the State Court judgment, and having failed to obtain such permission, their proceeding could not be operative to divest any title or right of possession under which the property was held by the Federal Court.

The Delaware Railroad Company was not a bona fide Purchaser.

It may be proper very briefly to notice the point taken by the Delaware Railroad Company, that they as alleged *bona fide* purchasers of the title acquired by the Delaware Construction Company under the Sheriff's sale have acquired a title which their grantees had not, and such an one as cannot be disturbed.

The fallacy of this proposition is obvious.

In the first place, the proposition that the Delaware Railroad Company was a *bona fide purchaser without notice* from the Delaware Construction Company, is preposterous.

The Delaware Railroad Company was merely a substantial *successor* to the Delaware Construction Company, formed by a reorganization made by the same stockholders with certain *colorable* variations, and a shifting of the title from one company to the other by a nominal exchange of two different sets of promissory notes.

The only change of shareholding interest which is pretended, was that one of the old Construction Company stockholders who had paid for his stock, was *dropped out* of their organization, and in the reorganization there were added three new shareholders, each with one share of $100, nominal value, and one party who took and paid for $3,000 of stock, and the whole arrangement for reorganization and shifting the title under the Sheriff's deed, was managed by the same person (as attorney and counsel for both companies) who had managed the legal controversy from the beginning, and was familiar with every step relating to it.

But it is needless to pursue this inquiry as to *bona fides* and want of notice in fact, because the provision of the Iowa statute relating to protection of the title of *bona fide* purchasers under judgments obtained by publication and subsequently reopened, is *utterly inapplicable to this case.*

The provision is merely that where a judgment is obtained by default upon publication, and subsequently vacated for the retrial of course given by the statute, the title of a *bona fide purchaser* upon a sale made under such judgment by default subsequently reopened, shall not be divested by the reopening.

Here was a judgment by default upon publication, against Thomson and Dennison, Trustees.

If that had been a judgment decreeing a sale to be made under it, and such sale had been made and the judgment had been subsequently reopened, the statute might have been applicable to a *bona fide* purchase under such judgment.

But no sale whatever took place under this judgment by default, which was subsequently reopened; and therefore the statute saving the rights of *bona fide* purchasers at such sale from being divested by the subsequent reopening, has not, even in the smallest degree, any application whatever.

The only sale or purchase ever made was under the original judgment against the railroad company, and it was of such title as the railroad company had. That was not a judgment upon publication, nor has it ever been reopened; and the statute in question has no reference whatever to that sale or to any title claimed under or in pursuance of it.

In Conclusion.

We trust it has been clearly shown that whatever may be the disposition made by the court of No. 30 and No. 29, the equity case No. 60 affords full opportunity for, and properly requires from this court, *a final determination of this entire controversy upon the merits.* That in that case, it is for the court to decide, not only the question of priority of lien (unless already adjudged in our favor in the other cases), but likewise all questions relating to the title to the road itself claimed under the Sheriff's deed and the State Court judgment against Dennison, and we pray the court to render such decision upon the merits, and not turn us over to the tender mercies of the State Court in the ejectment suit which the Delaware Railroad Company, in defiance of the judgment of the United States Circuit Court in the equity suit No. 29, is prosecuting against us in another State Court, and the decision in which is deferred awaiting the judgment of this court in those case.

We trust we have shown to the satisfaction of this court, that whatever may be its decision in the removal question, it has unquestionable jurisdiction, and that it is its duty in No.

29 not only to decide *upon its original merits*, the original disputed question of priority of lien, but likewise all the disputed questions of title under the State Court judgment and the Dennison judgment in the State Court.

And we trust we have also succeeded in satisfying the court that if this question of priority be held against us by this court, either upon its merits, or as being conclusively adjudged by the State Court, we have not lost our railroad, but can, at the worst, in the proper disposition of No. 29, be only adjudged to pay the amount of the lien and costs within a time fixed by the court for the purpose, or be foreclosed in default of such payment.

Our desire and our prayer to this court is, that these questions of priority and title be decided in this court, and not remitted to the State Courts in any form; and if this court be of opinion that we are bound to pay off this lien in order to clear our property from its effect, that it shall so order, and give us fair opportunity for such payment, with which order we shall make no hesitation in complying.

EVARTS, SOUTHMAYD & CHOATE,
For Meyer and Dennison, Trustees.

CHARLES F. SOUTHMAYD,
JOSEPH H. CHOATE,
Of Counsel.